121-172

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 155.

MOSES H. KATZENBERGER, WILLIAM KATZENBERGER, SENIOR, AND ISADORE KATZENBERGER, PARTNERS UNDER THE FIRM NAME AND STYLE OF S. KATZENBERGER'S SONS, PLAINTIFFS IN ERROR,

vs.

THE CITY OF ABERDEEN, IN THE COUNTY OF MONROE, STATE OF MISSISSIPPI.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

FILED OCTOBER 12, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 155.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a *Venue.*

UNITED STATES OF AMERICA,
Eastern Division of Northern Judicial District of Mississippi:
District Court, at Aberdeen.

Caption.

Pleas at a term of the United States district court for the eastern division of the northern judicial district of Mississippi, begun and held at the court-house, in the town of Aberdeen, on the first Monday in April, 1883.

Present: The Honorable Robert A. Hill, presiding judge of said court; Joseph L. Morphis, marshal, and George R. Hill, clerk.

Style.

S. KATZENBERGER'S SONS
vs.
THE CITY OF ABERDEEN. } No. 18.

(On the 14 day of September, 1882, plaintiffs filed their declaration in the words and figures following, to wit:)

1 *Declaration.*

UNITED STATES OF AMERICA, *State of Mississippi:*

In the District Court of the United States for the Eastern Division of the Northern Judicial District of Mississippi.

The plaintiffs, Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners in trade & doing business in Memphis, in the State of Tennessee, under the firm name and style of S. Katzenberger's Sons, all of whom are citizens & residents of said State of Tennessee, by their attorneys complain of the City of Aberdeen, a municipal corporation & body politic created & organized under the laws of the said State of Mississippi, and situated in the county of Monroe, in the said eastern division of the northern judicial district of the State last aforesaid, in an action of debt.

For that by an act of the Legislature of the State of Mississippi entitled "An act to amend the charter of the city of Aberdeen," approved November 15th, 1858, it was enacted that the mayor & selectmen of the City of Aberdeen were thereby empowered to contract with any railroad company and to subscribe, in the name and for the use of the City of Aberdeen, as many shares of the capital stock of such railroad company and upon such terms and conditions as they might stipulate and agree upon, as they should
2 deem expedient, not exceeding in amount the sum of one hundred thousand dollars.

And for that afterwards, to wit, on the — day of ——, 186–, a certain railroad corporation, to wit, The Memphis, Holly Springs, Oko-

lona & Selma Railroad Company, was duly and legally organized under the laws of the State of Mississippi.

And for that afterwards, to wit, on the — day of ——, A. D. 18—, the said mayor & selectmen of the City of Aberdeen, under, in pursuance of, and in accordance with [the] act aforesaid, did subscribe, in the name and for the use of the said City of Aberdeen, for one thousand shares of the capital stock of said railroad company, of the par value of one hundred dollars per share, aggregating in amount the sum of one hundred thousand dollars, and did then and there agree to issue to said railroad company, in payment for said stock, the twenty years' corporate coupon bonds of said city, of the denomination of five hundred dollars each, to the amount of one hundred thousand dollars, bearing interest at the rate of eight per ct. per annum, payable semi-annually.

And for that afterwards, to wit, on the 26th day of April, A. D. 1870, the said mayor & selectmen, in pursuance of their said contract of subscription, did make and execute, in the name of said city, and did then and [there] issue and deliver to said railroad
3 company, in payment for said capital stock, two hundred bonds of said city, for the sum of five hundred dollars each, numbered, respectively, from one to two hundred, both inclusive, consecutively, and each one of them signed by the mayor of said city & countersigned by the treasurer thereof, with the corporate seal of said city affixed to each, and each bearing date a certain day, specified on its face, to wit, the date last aforesaid, all of said bonds being of like tenor and effect, except as to the number borne by each, whereby, in each one of the aforesaid two hundred bonds, the said city acknowledged itself indebted and firmly bound to the Memphis, Holly Springs, Okolona & Selma Railroad Company in the sum of five hundred dollars, which sum the said city thereby promised (in each one of said bonds) to pay to the said Memphis, Holly Springs, Okolona & Selma Railroad Company, or bearer, at the office of the said railroad company, or at their agency, in the city of New York, in the State of New York, on the first day of May, A. D. 1890, together with the interest thereon at the rate of eight per cent. per annum, which interest it was declared (in each one of said bonds) should be payable semi-annually, on presentation & delivery of the attached interest coupons, on the first days of May and November of each year, at the office of said company, or their said agency, and whereby it was recited in each one of said bonds
4 to the effect following, to wit: This bond is issued in payment of stock of the Memphis, Holly Springs, Okolona and Selma Railroad Company, under and pursuant to the constitution and laws of the State of Mississippi and the charter of the City of Aberdeen and ordinances passed by the mayor and selectmen of said City of Aberdeen on the 26th day of April, A. D. 1870, each one of the said two hundred bonds, except as to the appropriate number of the bond borne by each as aforesaid, being in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *State of Mississippi:*

No. 13. $500.

City of Aberdeen bond, issued in payment of stock of the Memphis, Holly Springs, Okolona and Selma Railroad Co.

500 dollars. Twenty years. 500 dollars.

Know all men by these presents that the City of Aberdeen, in the county of Monroe, in the State of Mississippi, acknowledges itself indebted and firmly bound to the Memphis, Holly Springs, Okolona & Selma Railroad Company in the sum of five hundred dollars, which sum the said city promises to pay to the said Memphis, Holly Springs, Okolona and Selma Railroad Company, or bearer, at the office of said railroad company or at their agency in the city of New York, in the State of New York, on
5 the first day of May, A. D. 1890, together with the interest thereon at the rate of eight per cent. per annum, which interest shall be payable semi-annually, on presentation and delivery of the attached interest coupons, on the first days of May and November of each year, at the office of said company or their agency. This bond is issued under and pursuant to the constitution and laws of the State of Mississippi, the charter of the City of Aberdeen, and ordinances passed by the mayor and selectmen of said City of Aberdeen on the 26th day of April, A. D. 1870.

In witness whereof the mayor and treasurer of the board of mayor and selectmen of the City of Aberdeen, in the county of Monroe, in the State of Mississippi, have hereunto set their hands and caused their official seal to be hereunto affixed this the 26th day of April, A. D. 1870.

[City of Aberdeen, (L. S.) Mississippi.]

JAMES W. LEE,
Mayor of the City of Aberdeen, State of Mississippi.
JOHN B. SIMS,
Treasurer of the City of Aberdeen, State of Mississippi.

Upon each one of said two hundred bonds, except as to the appropriate number of each bond, there is endorsed the words and figures as follows, to wit:

STATE OF MISSISSIPPI, *County of Monroe, City of Aberdeen.*

6 Bond. Twenty years. No. 13. $500. Dated April 26, 1870. Payable May 1, 1890. Eight per cent. interest. Payable semi-annually at the office of the Memphis, Holly Springs, Okolona and Selma Railroad Company, or their agency in the city of New York.

The ordinances recited in each one of said bonds as having been passed by the mayor and selectmen of said city were duly and legally passed at a meeting of the board of mayor and selectmen of said city, duly and legally held in the mayor's office in said city on

the 26th day of April, A. D. 1870, and were then and there duly and legally made of record in the proper record book of the proceedings of the said board of mayor and selectmen, and are in the words and figures as follows, to wit:

SECTION 1. Be it ordained by the mayor and selectmen of the city of Aberdeen, in council assembled, That the city of Aberdeen do hereby subscribe to the capital stock of the Memphis, Holly Springs, Okolona and Selma R. R. Company the sum of one hundred thousand dollars, to be paid in bonds of the said city of Aberdeen, each of the denomination of five hundred dollars ($500.00), maturing twenty years from the first day of May, A. D. 1870, bearing eight per cent. interest per annum, payable semi-annually on the first days of May and November of each year, said bonds to be signed by the mayor of the city of Aberdeen and countersigned by the treasurer thereof, with the corporate seal of said city affixed.

7

SECTION 2. Be it further ordained, That the bonds issued in pursuance of section first of this ordinance have interest coupons attached signed by the treasurer of said city of Aberdeen or with his signature lithographed thereto.

SECTION 3. Be it further ordained, That the form of the bonds of the city of Okolona issued to said railroad company be adopted as the form of the bonds issued to said railroad company by the city of Aberdeen, issued in pursuance of the foregoing ordinances, and that the city attorney be instructed to prepare immediately a form for said bonds and have the same lithographed.

SECTION 4. Be it further ordained, That this subscription is upon condition that said Memphis, Holly Springs, Okolona and Selma railroad shall pass through the city of Aberdeen, Mississippi, and the amount of said subscription be expended in constructing said railroad in and through the county of Monroe, in said State.

SECTION 5. Be it further ordained, That as soon as said bonds are lithographed and signed as herein directed the mayor of said city shall hand the same over to the Memphis, Holly Springs, Okolona and Selma Railroad Company, and receive therefor the certificate of stock of said company.

8

And for that to each one of the aforesaid bonds there was attached and executed simultaneously with each bond and therewith delivered to said railroad company an interest coupon for twenty dollars, maturing on each and every first day of May and each and every first [day] of November intervening between the date & the maturity of said bonds (not including the first day of May, 1870), commencing with the first day of November, A. D. 1870, and ending with the first day of May, A. D. 1890, making forty coupons, for twenty dollars each, attached to each of the aforesaid bonds, the coupons on each bond being numbered consecutively from one to forty, both inclusive, each coupon bearing also upon its face the number of its bond, and signed by the treasurer of said city, with a *fac-simile* engraving or lithograph of his signature, whereby in each one of the aforesaid eight thousand coupons the City of Aberdeen aforesaid acknowledges itself to owe the sum of twenty dollars, pay-

able to bearer (on a particular day named in the face of each coupon, to wit, one of the days last aforesaid above described as being the days on which the coupons attached to each bond matured or are to mature respectively), at the office of the Memphis, Holly Springs, Okolona & Selma R. R. Co. (thereby meaning the Memphis, Holly Springs, Okolona & Selma Railroad Company), or their agency in the city of New York, for six months' interest on a particular bond, to wit, the bond to which it was attached, described on the face of each coupon by the proper number of the bond.

And for that afterwards, to wit, on the — day of March, 1874, the said plaintiffs became, and are now, the owners, holders, and bearers for value of one hundred & fifty-six of the aforesaid bonds, part of the two hundred bonds hereinbefore described, to wit, two (2) bonds, numbered thirteen (13) and fourteen (14) respectively; five (5) bonds, numbered consecutively thirty-six (36) and forty (40), both inclusive; thirty-two (32) bonds, numbered consecutively forty-four (44) and seventy-five (75), both inclusive; seven (7) bonds, numbered consecutively seventy-eight (78) and eighty-four (84), both inclusive; fifteen bonds, numbered consecutively ninety (90) and one hundred & four (104), both inclusive, and ninety five (95) bonds, numbered consecutively one hundred & six (106) and two hundred (200), both inclusive, with the said interest coupons attached to each one of the said one hundred & fifty-six (156) bonds, as hereinbefore stated to have been attached at the time of their issuance and delivery as aforesaid, except that from each one of the said one hundred & fifty-six (156) bonds the seven interest coupons first maturing had, at the time of such purchase, been detached and paid, and were not purchased by the plaintiffs.

And for that afterwards, to wit, on the first day of August, A. D. 1882, the said plaintiffs still being, as they are now, the owners, holders, and bearers for value of the one hundred & fifty-six (156) bonds and their attached coupons last aforesaid, did, on the day last aforesaid, cut, clip, and detach from each one of the bonds last aforesaid the seventeen (17) interest coupons which matured on and prior to the first day of May, A. D. 1882, to wit, commencing with those which matured on the first day of May, 1874, and ending with *with* that which matured on the first day of May, 1882, making in all two thousand six hundred & fifty-two (2,652) interest coupons, for twenty dollars each; and each one of said last-mentioned coupons, except as to the date of maturity and number of the coupon and the number of its proper bond borne by each coupon, being in the words and figures as follows, to wit:

THE CITY ABERDEEN, $20

In the County of Monroe and State of Miss.,

Acknowledges to owe the sum of twenty dollars, payable to bearer on the first day of May, 1874, at the office of the Memphis, Holly Springs, Okolona & Selma R. R. Co., or their agency in the city of New York, for six months' interest on bond.

No. 13. JOHN B. SIMS, *Treasurer.*

All of which said twenty-six hundred & fifty-two (2,652)

interest coupons (a true copy of each one of which is herewith filed) the said plaintiffs purchased as aforesaid on the — day of March, 1874, before their maturity or the maturity of any one of them, for a consideration valuable in law, and thereby became and are now the owner-, holder-, and bearers of the same, for value. And the coupons last aforesaid, at the time that they respectively matured as aforesaid, and also at the time that the said plaintiffs detached them from their respective bonds as aforesaid, the plaintiffs did present for payment according to their tenor and effect, and payment thereof and of each and every one of them was refused, nor hath the said city, nor any one for it, ever paid said last-mentioned coupons, nor any one of them, nor any part of any one of them, but to do the same hath and still doth neglect and refuse, and the same still remain and are unpaid, whereby an action hath accrued to the said plaintiffs to have and recover of and from the said defendant the several sums of money in said last-mentioned twenty-six hundred & fifty-two (2,652) coupons specified, with interest on each sum from the time when due until the same shall be paid. Wherefore the plaintiffs sue and demand judgement for the sum of sixty thousand dollars.

CRAFT & COOPER AND CALVIN PERKINS,
Att'ys for Plaintiffs.

(Endorsed:) Filed Sept. 14, 1882. & summons issued. G. R. Hill, clerk.

(With this declaration the original 2,652 coupons sued on were filed, copys of which are in the word- & figures following, to wit:)

12-166 THE CITY ABERDEEN, $20

In the County of Monroe and State of Miss.,

Acknowledges to owe the sum of twenty dollars, payable to bearer on the first day of May, 1874, at the office of the Memphis, Holly Springs, Okolona & Selma R. R. Co., or their agency in the city of New York, for six months' interest on bond.

No. 13. JOHN B. SIMS, *Treasurer.*

(Here follow 2,651 coupons, identical with the foregoing coupon, except as to numbers & dates, omitted in printing record per stipulation of counsel. See p. 189.)

167 *Summons.*

The President of the United States to the marshal of the northern district of Mississippi, Greeting:

We command you without delay to summon the City of Aberdeen, a municipal corporation and body politic created and organized under the laws of the State of Mississippi, situated in the county of Monroe and citizen of the State of Mississippi, residing in the northern district and the eastern division thereof, that it be and appear before the district court of the United States, to be held in the town of Aberdeen, for the eastern division of the northern district of Mississippi, on the first Monday of October next, to answer the complaint of Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners in trade and doing business under the firm name and style of S. Katzenberger's Sons, citizens of the State of Tennessee, and that it do file its answer or defence with

the clerk of said court on or before the meeting of the same or judgement will be given against it by default; and have you then and there this writ.

Witness the Honorable R. A. Hill, judge of the district court for the State of Mississippi, & the seal of the district court, at Aberdeen, on the day of issuance.

Issued the 14th day of September, 1882.

[SEAL.] G. R. HILL, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Mississippi:

168 This action is brought to recover on coupons & for interest on bonds of the City of Aberdeen issued in aid of the Memphis, Holly Springs, Okolona & Selma R. R. Co., there being 34 coupons from bonds Nos. 36–40, both inclusive, & 119 coupons from 7 bonds, Nos. 78, 15, 84, both inclusive, & 255 coupons from 15 bonds, Nos. 90 to 104, both inclusive, & 544 coupons from 32 bonds, Nos. 44 to 95, both inclusive; 1,615 coupons from 95 bonds, Nos. 106 to 200, both inclusive, each for the sum of $20.00; said several sums is the demand.

G. R. HILL, *Clk.*

Service by Marshal.

Executed by personal service on W. E. Love, mayor of the City of Aberdeen, & by handing to him a true copy of the written summons this September 18th, 1882.

J. L. MORPHIS,
U. S. Marshal,
By R. O. BEAN, *Dep't.*

(On Oct. 13, 1882, defendant filed its demurrer to the plaintiffs' declaration, as follows, to wit:)

169 *Demurrer to Decl'n.*

In the District Court of the United States of America for the Eastern Division of the Northern Judicial District of Mississippi. October Term, 1882.

S. KATZENBERGER'S SONS *vs.* THE CITY OF ABERDEEN.

UNITED STATES OF AMERICA, *State of Mississippi:*

The said defendant, by attorneys, says the said declaration is insufficient in law, and shows to the court here the following causes of demurrer thereto:

1. The facts stated disclose no cause of action against this defendant.

2. No such corporation as the Memphis, Holly Springs, Okolona & Selma Railroad Company has ever been legally incorporated by the Legislature of the State of Mississippi.

3. The act of the Legislature of said State of February 20, 1867, if anything, was a legislative usurpation, and was and is void. The corporators of the Memphis, Holly Springs, & Mobile Railroad Company, under the act of November 23, 1859, could not be deprived of their charter by the act of February 20, 1867.

4. The act of November 23, 1859, has never been revived. The act of February 20, 1867, if valid for any purpose, revived
170 and amended a corporation of a different name from that of the Memphis, Holly Springs & Mobile Railroad Company, and one incorporated by an act of the Legislature of said State passed five years previously.

4½. The act of November 15, 1858, did not authorize the subscription in payment of which the bonds & coupons in the declaration mentioned were issued.

5. The act of the Legislature of said State of November 15, 1858, referred to in said declaration, confers no power upon the defendant to issue the negotiable securities described in declaration in payment of the subscription thereby authorized. The payment thereof by taxation is the sole and exclusive manner of payment therein allowed or authorized.

6. It is not recited upon the face of the bonds and coupons mentioned in the declaration, nor is it averred in the declaration that prior to the institution of this suit the levying of a tax to pay the subscription had been approved in an election by a majority of the legal voters of said city, as provided by section 2 of said act of November 15, 1858.

7. The interest coupons sued on are utterly void. They are signed alone by the treasurer of said city, who has no power whatever under the city charter except to keep and disburse the moneys
171 belonging to the corporation.

8. For other good causes.

Wherefore it prays judgement, &c.

SYKES & BRISTOW, &
DAVIS, McFARLAND & PAINE,
Counsel for Defendant.

(On April 25, 1883, judgment was rendered by the court on said demurrer, as follows, to wit:)

172 *Judgment on Demurrer.*

S. KATZENBERGER & SON *vs.* THE CITY OF ABERDEEN.

Came the parties, by their attorneys, and came on to be heard the demurrer interposed by the defendant to the declaration therein, and after argument of attorneys *pro* and *con*, and the same being duly considered by the court, it is ordered that said demurrer be, and the same is hereby, sustained; and leave is hereby granted to the plaintiffs to amend their declaration, which they decline to do. It is therefore considered by the court that the plaintiffs go hence and take nothing by their said declaration, and that they pay the costs in this behalf expended, for which execution may issue.

Wednesday, April 25th, A. D. 1883.

I hereby certify that the foregoing transcript of the papers therein mentioned are true and correct copies as they appear from the files in this office.

Given under my hand and the seal of this court the 13th day of August, A. D. 1883.

[Seal United States District Court, Northern District Miss., Eastern Division.]

G. B. HILL, *Clerk*,
By W. H. VASSER, *D. C.*

(The written opinion delivered by the court in rendering the above judgment is as follows, to wit:)

173 *Opinion of Court.*

In the District Court of the United States for the Northern District of Mississippi, at Aberdeen. April Term, 1883.

S. KATZENBER'S SONS *vs.* THE CITY OF ABERDEEN.

The questions now presented arise upon defendant's demurrer to plaintiffs' declaration.

The demurrer raises the question as to whether or not the declaration sets out a good cause of a claim against the defendant which involves the examination of the facts as set out on the face of the declaration and the rules of law applicable thereto.

The declaration, in substance, avers that the defendant is a corporate body created by the laws of the State of Mississippi; that by an act of the Legislature of this State said corporation was authorized to subscribe and contract with any railroad company for capital stock therein for the use of Aberdeen, which act was approved on the 15th of November, 1858.

That afterwards, under and by the authority of the laws of said State, a railroad company was organized by the name of the Memphis, Holly Springs, Okolona and Selma Railroad Company, and that afterwards the defendant, by its mayor and selectmen, did subscribe

174 for one thousand shares of the capital stock in said railroad company at one hundred dollars per share, and as a part of said subscription, contract, and agreement did contract and agree to issue and deliver to said company, in payment for said capital stock, its bonds, with interest coupons attached, amounting to one hundred thousand dollars, due and payable twenty years after date; that in pursuance to said contract and subscription said subscription was made and said bonds were issued, bearing date 26th day of April, 1870, and delivered to said company, which bonds were made payable to bearer at the office of said company or at their agency in the city of New York and State of New York, and to which bonds were attached coupons for the interest, at 8 per cent. per annum, payable semi-annually.

The declaration further avers that said bonds contain on their face the following recitation, to wit: "This bond is issued in payment of stock of the Memphis, Holly Springs, Okolona and Selma

Railroad Company, under and pursuant to the constitution and laws of the State of Mississippi and the charter of the City of Aberdeen and the ordinance passed by the mayor and selectmen of the City of Aberdeen on the 25th day of April, 1870." Copies of the bonds and interest coupons attached are set out in the declaration, as well as a copy of the ord-nance of the mayor and selectmen, authorizing the subscription and issuance of the bonds & coupons.

The declaration further avers that in March, 1874, the plaintiffs became and are the bearers, owners, and holders for value of
175 one hundred and fifty-six of the two hundred bonds so issued, amounting to the sum of $78,000, with the interest coupons attached, except that the first seven coupons on each had before that been detached and paid.

These are all the recitations that need be made from the declaration to an understanding of the question raised by the demurrer.

The demurrer sets out eight causes or grounds therefor, but after carefully considering the same, with the light given by the ex-austive arguments of the distinguished counsel on both sides and review of the authorities produced, I am satisfied that only two need be considered, which must be decisive of the case, which are—first, was there authority, express or necessarily implied, to issue the bonds and the coupons sued upon, and, if not, has their issuance been since ratified and confirmed by the Legislature or by the acts of the city through its officers? That there was no express authority to issue the bonds is admitted, and that there has been since no legislative act expressly approveing and confirming their issuance is also admitted.

The rule is well settled by all the decisions of the Supreme Court of the United States, from Knox *vs* Aspinwall, 31 How., 539, up to the present time, that to render these securities valid there must have been legislative authority, express or necessarily implied, authorizing their issuance. It is, however, equally well settled that
176 the Legislature may, by a curative act, remedy irregularities and such other defects as it might have provided for in the original grant of power.

The act of the Legislature authorizeing the city of Aberdeen to subscribe for capital stock, relied upon as authority for the issuance of the bonds and coupons averred in the declaration, is as follows: "That the mayor and selectmen of the city of Aberdeen be, and they are hereby, empowered to contract with the New Orleans, Jackson and Great Northern Railroad Company, or with any other railroad company, and to subscribe, in the name and for the use of the city of Aberdeen, as many shares of capital stock of said company and upon such terms and conditions as they may stipluate and agree upon, not exceeding in amount the sum of one hundred thousand dollars."

The second section of the act provides: "That the mayor and selectmen of the city of Aberdeen are hereby empowered to levy a tax on all the property within the corporate limits of said city subject at the time to State and county tax, and upon the gross incomes of all persons and corporations residing or doing business within the

corporate limits of said city, to be applied to the payment of the aforesaid subscription for stock, as provided in the first section of this act: Provided, That before such tax shall be levied the same shall be approved by a majority of the legal voters of said
177 city, to be ascertained by an election held as other elections in said city."

The third section provides for the appointment of a collector of the tax. It is necessary to ascertain the true legislative intention in passing this act, and in doing so we must look into the history and policy of the State in relation to this subject at the time the act was passed.

There had not been before that time, or for a considerable time afterwards, bonds authorized to be issued, or issued by county, towns, or cities, in payment for capital stock in railroad companies in this State, but payment was habitually provided by taxation, and such is the provision found in the act. The act further provides: "That the taxes shall not be levied to pay the subscription without the assent thereto by a majority of the qualified voters within the city."

The mayor and selectmen were authorized to contract for the subscription for capital stock upon such terms and conditions as might be agreed upon, which, it is reasonable to presume, were as to amount, time of payment, and any other condition as to the location of the road, time of completion, *et*. The subscription was but one step in the contract, giving all its terms and conditions to enable the voters to determine whether they would authorize the levying of the necessary tax for its payment. The contract was incomplete and
178 had no binding force until this assent was given in the mode provided in the act. Taxation is the only mode provided for the payment of the subscription, and excludes the idea of any other mode. The tax-payers, represented by a majority of the qualified voters, had a right, and were given by the act the privilege, of knowing what amount of taxes were to be raised, and when paid. This subscription, or, rather, proposed subscription, with all its terms, was to be made known, as agreed upon between the corporate authorities and the company, before the vote was taken.

The case of Wells *vs.* Supervisors of Pontotoc County, first decided by this court, and afterwards affirmed by the Supreme Court, 112 U. S., 625, I am satisfied fully sustains the above conclusions.

Without further comment on this branch of the inquiry, I am satisfied that there was no implied or other authority to issue the securities sued upon, which brings us to consider whether or not the issuance of these securities was afterwards approved and ratified by the act of 1872, relied upon as a confirmation and ratification of the acts of the municipal authorities in making the subscription and issuing the securities sued for.

The fourth section of this act is as follows:

"That all subscriptions to the capital stock of said Selma, Marion and Memphis Railroad Company made by any county, city,
179 or town in this State which were not made in violation of the constitution of this State are hereby legalized, ratified, and confirmed."

This act says nothing about the issuance of bonds and coupons. It may be admitted that the name of the Selma, Marion and Memphis Railroad Company is but a change of the name of the Memphis, Holly Springs, Okolona and Selma Railroad Company, & that the intention was to ratify and confirm subscriptions to the capital stock by the latter name, and that the effect of the act was to cure any defects in subscriptions to the capital stock in such company. Yet, if I am correct in holding that the subscription, as made, was unauthorized by law and of no binding force without the assent of the legal voters of the city, which, it is not averred, was given for the levy of taxes to pay the subscription, it remained a nul-ity and was incurable. The Legislature will not be presumed to have intended to make a contract for the city of Aberdeen, to which it had never been a party. The action of the mayor and selectmen, made without authority of the law, was as though it never had been.

But I am relieved from further difficulty on this question by the construction given to this act by the supreme court of the State, found in the opinion of the court in the case of Sykes *vs.* the Mayor and Aldermen of the City of Columbus, 55 Miss., 115. The construction given by the court is that the Legislature only intended by this act to ratify and confirm subscriptions made by counties, cities, and towns to the capital stock in this railroad company au-
180 thorized by the act of 1870, when not in conflict with the 14 section of article 12 of the constitution of the State; and, further, that the Legislature could not cure and validate by that act a subscription for stock when the subscription would have been invalid under this provision of the constitution if then made for the first time.

The numerous authorities referred to by C. J. Simrall, in his able opinion, fully sustain the conclusion reached in that case, and whether so or not it is a construction given by the supreme court of the State upon one of its statutes and is binding in this court. Applying this construction of the statute to the bonds and coupons in this case and they derive no validity whatever from this legislation, and consequently have no validity whatever and are mere nul-ities. I might refer to the numerous authorities cited and relied upon by the counsel on both sides, but it would extend this opinion, already too long, without benefit to any one.

The result is that the demurrer to the declaration must be sustained, with leave to the plaintiffs to amend, if they are advised to do so.

[Seal United States District Court, Northern District Miss., Eastern Division.]

R. A. HILL, *Judge*.

I hereby certify the foregoing to be a true and correct copy of the opinion of the court in the case therein stated as it appears from the original on file in my office.

Witness my hand and seal of the court this 13th day of August, A. D. 1883.

G. R. HILL, *Clerk*,
By W. H. VASSER, *D. C.*

181 *Writ of Error.*

UNITED STATES OF AMERICA, *88:*

The President of the United States to the honorable the judge of the of the district court of the United States in and for the northern district of Mississippi, at Aberdeen, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said district court before you, between Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners in trade under the firm name & style of S. Katzenberger's Sons, plaintiff-, and the City of Aberdeen, in the county of Monroe, in the State of Mississippi, defendant, a manifest error hath happened, to the great damage of the said Moses H., William, and Isadore Katzenberger, as by complaint appears, we, being that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1883, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said district court, at Aberdeen, this 13th day of August, A. D. 1883, and 108 year of American Independence.

G. R. HILL, *Clerk,*
By W. H. VASSER, *D. C.*

182 [Endorsed:] District court of the U. S., northern dist. of Miss., at Aberdeen. No. 18. Writ of Error. S. Katzenberger's Sons *vs.* The City of Aberdeen. Issued the 13th day of August, A. D. 1883. G. R. Hill, clerk, by W. H. Vasser, D. C.

In accordance with the command of the within writ I have caused to be made out, under the seal of the said court, a transcript of all the record, process, proceedings, & judgement in the cause therein named, with all things concerning the same, and here now transmit the same, together with this writ, to the Supreme Court of the United States, at Washington, so that the same may be before said Court on the 2nd Monday of October, 1883.

Witness my hand & the seal of this court this the 13th day of August, A. D. 1883.

[Seal United States District Court, Northern District Miss., Eastern Division.]

G. R. HILL, *Clerk,*
By W. H. VASSER, *D. C.*

183 *Writ of Error. Bond.*

Be it known that we, Moses H. Katzenberger, as principal, and John Armistead and Simon Lundee, as sureties, are held and firmly bound unto the City of Aberdeen, in the county of Monroe, in the State of Mississippi, in the sum of five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals & dated this — day of August, 1883.

Whereas the above-named Moses H. Katzenberger, together with William Katzenberger, Sr., and Isadore Katzenberger, partners in trade under the firm name & style of S. Katzenberger's Sons, are prosecuting a writ of error to the Supreme Court of the United States to reverse the judgment rendered at its April term, 1883, by the district court of the United States for the northern district of Mississippi, at Aberdeen, in a case lately pending in said district court between the said Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners in trade under the firm name & style of S. Katzenberger's Sons, plaintiffs, and the said City of Aberdeen, defendant: Now, if the said plaintiffs in error shall prosecute their writ to effect, or, in case they fail to make
184 their plea good, shall answer all costs, then this obligation to be void; otherwise to remain in full force and virtue.

MOSES H. KATZENBERGER. [SEAL.]
JOHN ARMISTEAD. [SEAL.]
SIMON LUNDEE. [SEAL.]

Acknowledged before me this 6th day of August, 1883.

[Seal Lowry W. Humes, United States Commissioner for Western District of Tenn., Memphis, Tenn.]

L. W. HUMES,
U. S. Com'r.

THE STATE OF TENNESSEE, *County of Shelby:*

Before me, Lowry W. Humes, a commissioner of the circuit court of the United States, duly appointed & qualified, in & for the western district of Tennessee, on this day personally appeared John Armistead and Simon Lundee, both of whom are to me well known, who having been first duly sworn, on oath did depose & say, each one for himself, that he is seized & possessed, in his own right as of fee of a clear unencumbered estate, in real property, situated in the State of Mississippi, and liable to execution, of the value of more than five hundred dollare over & above his just debts & legal liabilities.

JOHN ARMISTEAD.
SIMON LUNDEE.

Sworn to and subscribed before me, this 6th day of August, 1883.

[Seal Lowry W. Humes, United States Commissioner for Western District of Tenn., Memphis, Tenn.]

L. W. HUMES,
U. S. Com'r.

I hereby approve the foregoing bond and security this 7th day of August, 1883.

R. A. HILL, *Judge.*

[Endorsed:] No. 18. District court of U. S., northern district of Miss. At Aberdeen. Bond. Writ of error to U. S. Supreme Court. S. Katzenberger's Sons *vs.* The City of Aberdeen.

185 *Citation.*

United States of America to the City of Aberdeen, in the county of Monroe, in the State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1883, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Mississippi, at Aberdeen, wherein Moses H. Katzenber, William Katzenber, Sr., and Isadore Katzenberger, partners in trade under the firm name & style of S. Katzenberger's Sons, are plaintiffs and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable R. A. Hill, judge of the district court of the United States for the northern district of Mississippi, this 7th day of August, 1883.

R. A. HILL, *Judge.*

Issued August the 13th, A. D. 1883.

[Seal of United States District Court, Northern District Miss., Eastern Division.]

G. R. HILL, *Clerk,*
By W. H. VASSER, *D. C.*

185½ [Endorsed:] District court of U. S., northern district of Miss., at Aberdeen. No. 18. Citation. S. Katzenberger's Sons *vs.* The City of Aberdeen.

Came to hand Aug'st 13, 1883.

J. L. MORPHIS,
U. S. Marshal.

Executed the within process by reading the same and giving a copy to W. E. Love, mayor of the City of Aberdeen, this August 13, 1883.

J. L. MORPHIS,
U. S. Marshal,
By W. H. CLOPTON,
Deputy Marshal.

Marshal's costs, $3.50.

186 *Assignment of Errors.*

Supreme Court of the United States. October Term, 1883.

MOSES H. KATZENBERGER, WILLIAM KATZENBERGER, SR., and Isadore Katzenberger, Partners in Trade as S. Katzenberger's Sons,
vs
THE CITY OF ABERDEEN. } No. 18.

In the District Court of the United States for the Northern District of Mississippi, at Aberdeen.

Come the said plaintiffs in error, by their attorneys, and say that in the record and proceedings aforesaid, and also in giving the judgment therein at the April term, 1883, of said district court, there is manifest error in this, to wit: That the said district court erred in sustaining the demurrer of the defendant to the declaration of the plaintiffs.

187 And the said Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners in trade, &c., as aforesaid, pray that the judgment aforesaid, for the error aforesaid, and other errors in the records and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that the defendant be required to answer over.

CRAFT & COOPER AND
CALVIN PERKINS,
Att'ys for Pl'ffs in Error.

188 [Endorsed:] No. 18. District court of U. S., northern district of Miss., at Aberdeen. S. Katzenberger's Sons *vs.* The City of Aberdeen. Assignment of errors to Supreme Court of the United States.

189 Supreme Court of the United States.

MOSES H. KATZENBERGER *et al.*, P. E.,
vs.
THE CITY OF ABERDEEN, MISSISSIPPI. } No. 155.

It is hereby stipulated by and between the counsel in the above-named cause that in printing the record thereof the one hundred and fifty-five (155) pages of coupons set out in the record shall be omitted and only one coupon shall be printed, with a statement that the others are identical, except as to numbers and dates.

This July 26th, 1886.

HENRY CRAFT,
For Pl'ff- in Error.
E. O. SYKES,
BAXTER McFARLAND,
For Defendant in Error.

190 [Endorsed:] Supreme Court U. S. Oct. term, 1886. No. 155. Katzenberger *et al.*, appellants, *vs.* The City of Aberdeen. Stipulation to omit certain parts of record in printing. [Stamped:] Office Supreme Court U. S. Filed Aug. 2, 1886. James H. McKenney, clerk.

Endorsed on cover: N. Mississippi D. C. U. S. No. 155. Moses H. Katzenberger, William Katzenberger, Sr., and Isadore Katzenberger, partners under the firm name and style of S. Katzenberger's Sons, plaintiffs in error, *vs.* The City of Aberdeen, in the county of Monroe, State of Mississippi. Filed 12th October, 1883.

121-172

Supreme Court of the United States

OCTOBER TERM, 1886.

S. KATZENBERGER'S SONS,

PLAINTIFFS IN ERROR,

No. 155. *vs.*

THE CITY OF ABERDEEN

ERROR TO THE DISTRICT COURT FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI.

Brief for Plaintiffs in Error.

A. G. TOOF & CO. PRS. & LITHS., MEMPHIS.

Supreme Court of the United States.

OCTOBER TERM, 1886.

S. KATZENBERGER'S SONS, Plaintiffs in Error, } Error to District Court, East. Div. Northern District of Mississippi.

No. 155. vs.

THE CITY OF ABERDEEN. }

STATEMENT OF CASE.

This is a suit upon coupons detached from certain bonds issued by the appellee, and the authority for the issuance of the bonds was and is claimed under the following act of the Legislature:

"*AN ACT to Amend the Charter of the City of Aberdeen.*

"Section 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Mayor and Selectmen of the city of Aberdeen be and they are hereby empowered to contract with the New Orleans, Jackson & Great Northern Railroad Company, or with any other railroad company, and to subscribe, in the name, and for the use of the city of Aberdeen, as many shares of the capital stock of said company, and upon such terms and conditions as they may stipulate and agree upon, as they shall deem expedient, not exceeding in amount the sum of one hundred thousand dollars.

"Sec. 2. *Be it further enacted*, That the Mayor and Selectmen of the said city of Aberdeen, are hereby empowered to levy and collect a tax on all the property within the corporate limits of said city, subject at the time to State or

county tax, and upon the annual gross incomes of all persons or corporations residing or doing business in the corporate limits of said city, to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this act: Provided, that before such tax shall be levied, the same shall be approved by a majority of the legal voters of said city, to be ascertained by an election, held as the other elections in said city.

"Sec. 3. *Be it further enacted*, That the said tax shall be levied and collected as other taxes of said city, and the tax collector is hereby required to execute a bond with good security, to be approved by the said Mayor and Selectmen, conditioned for faithful performance of his duties as such collector, and that he will pay over the monies collected, as directed by the said Mayor and Selectmen, and such tax collector shall receive for his services one per centum on the amount collected, and no more.

"Sec. 4. *Be it further enacted*, That the gross amount of the annual income of each and every person and corporation residing or doing business within the corporate limits of said city, shall be ascertained by the said tax collector, who for such purpose is authorized and required to administer an oath to each person or his agent, or the proper officer of a corporation, as to the amount of his, her or their annual income, and any person willfully swearing falsely as to the amount of such income, shall be deemed guilty of perjury, and upon conviction thereof, shall be punished as in other cases of perjury.

"Sec. 5. *Be it further enacted*, That this act shall take effect from and after its passage.

"Approved November 15, 1858."

Laws of Miss., 1858, pp. 221 and 222.

The declaration alleges, that after the passage of the above act, the Memphis, Holly Springs, Okolona & Selma Railroad Company was duly and legally organized, and that thereafter, on the ——day of ——————, 18—,

the Mayor and Selectmen of said city, in pursuance of the act of 1858, did subscribe for one hundred thousand dollars of the capital stock of said railroad company, and did then and there agree to issue, in payment of said stock, the corporate, coupon bonds of said city, of the denomination of five hundred dollars each, to the amount of one hundred thousand dollars, and bearing interest at the rate of eight per cent. per annum, payable annually. Record, p. 2.

That afterwards, on the 26th day of April, 1870, the said Mayor and Selectmen in pursuance of their contract of subscription, did execute and then and there deliver in payment for said capital stock, the bonds agreed to be so delivered. Record, p. 2.

That the bonds so issued were made payable to the said railroad company or bearer at the office of the railroad company, in the city of New York, on the first day of May, 1890, and that to each bond was attached appropriate coupons to cover the semi-annual installments of interest, such coupons being made payable to bearer at the office of the company in the city of New York.

That each bond has upon its face the following recital: "This bond is issued in payment of stock of the Memphis, Holly Springs, Okolona & Selma Railroad Company, under and pursuant to the Constitution and laws of the State of Mississippi, and the charter of the city of Aberdeen, and ordinances passed by the Mayor and Selectmen of said city of Aberdeen on the 26th day of April, 1870."

Record, p. 2.

The declaration then sets out a copy of one of the bonds [Record, p. 3,] and following that, a copy of the ordinances referred to in the bonds.

The first section of the ordinances is to the effect following: "That the Mayor and Selectmen do hereby subscribe to the capital stock of said railroad company, the sum of one hundred thousand dollars, to be paid in bonds of the

said city, each of the denomination of five hundred dollars, maturing twenty years from the first day of May, 1870, bearing eight per cent. interest, payable semi-annually, to be signed by the Mayor and countersigned by the treasurer, with the corporate seal of the city affixed."

Record, p. 4.

The second section directs that the bonds shall have interest coupons attached signed by the treasurer of the city.

Record, p. 4.

The third section prescribes the form of the bonds.

Record, p. 4.

The fourth section attaches two conditions to the subscription: First, that the railroad shall pass through said city. Second, *that the amount of the subscription shall be expended in constructing said railroad through the county of Monroe.* Record, p. 4.

The fifth and last section, directs the Mayor, when the bonds are completed, to deliver them and receive from the railroad company its certificates of stock. Record, p. 4.

The declaration then alleges that there was attached to, and executed simultaneously with each bond, interest coupons maturing *semi-annually*, to cover the interest as provided in the ordinances. Record, p. 4.

That before the maturity of the coupons sued on, the plaintiffs purchased them, together with the bonds to which they were attached, for value, and that at the time of such purchase the seven coupons, on each bond, which first matured, had been detached and paid. Record, p. 5.

That before the bringing of this suit, the coupons sued on were detached from the bonds. Record, p. 5.

The defendant demurred, assigning, in substance:—That there was no such corporation as the Memphis, Holly Springs, Okolona & Selma Railroad Company; that the act of 1858 conferred no authority to make the subscription;

that it conferred no power to issue negotiable securities; that the bonds do not recite, nor the declaration allege that there was ever any election approving the levying of a tax to pay the subscription; that under the charter of the city the treasurer had no power to sign the coupons.

Record, p. 2.

The demurrer was sustained and judgment final rendered.

Record, p. 8.

The error assigned is the sustaining of the demurrer.

BRIEF FOR PLAINTIFFS IN ERROR.

The suit in this case is upon coupons detached from bonds of the city of Aberdeen "issued in payment of stock of the Memphis, Holly Springs, Okolona & Selma Railroad Company." The plaintiffs in error are *bona fide holders*, having purchased for value the bonds with the coupons sued on attached, before the maturity of the coupons.

The defendant in the court below interposed eight grounds of demurrer. The court below only considered two, using this language: "I am satisfied only two need be considered which must be decisive of this case, which are: first, Was there authority, express or necessarily implied, to issue the bonds and the coupons? and if not, Has their issuance since been ratified and confirmed by the Legislature, or by the acts of the city through its officers?"

We will now consider these two grounds of demurrer in their order:

First. Did the city have authority, express or implied, to issue these bonds?

We rely upon the act of 1858, under which the bonds were issued, which is entitled "An Act to Amend the

Charter of the City of Aberdeen," approved Nov. 15, 1858, (Acts of 1858, pp. 221, 222), for the authority claimed, and confidently insist that it gave full and ample power to issue the bonds and coupons.

The first section of the act is in these words: "Sec. 1. Be it enacted by the Legislature of the State of Mississippi, That the Mayor and Selectmen of the city of Aberdeen be and they are hereby empowered to contract with the New Orleans, Jackson & Great Northern Railroad Company, or with *any other railroad company*, and to subscribe in the name and for the use of the city of Aberdeen, as many shares of the capital stock of said company, and upon such *terms* and *conditions* as they may *stipulate* and *agree upon* as they shall deem expedient, not exceeding in amount the sum of one hundred thousand dollars."

The second section is in words following: "Sec. 2. Be it further enacted, That the Mayor and Selectmen of the said city of Aberdeen are hereby empowered to levy and collect a tax on all the property within the corporate limits of said city subject to State and county taxes * * * * to be applied to the payment of the aforesaid *subscription of stock* as *provided* in the *first section* of this act: Provided, that before *such tax* shall be levied the same shall be approved by a majority of the legal voters of the city, to be ascertained by an election, held as other elections in said city."

The third section provides for the collection of the tax.

These are the only parts of said act which bear upon the question.

It is clear that the first section empowered the Mayor and Selectmen of the city of Aberdeen "to contract with the Memphis, Holly Springs, Okolona & Selma Railroad Company," and to subscribe in the name and for the use of the city of Aberdeen, as many shares of the stock of said company as they desired, not to exceed $100,000.

It will not be denied that this act gave full power to subscribe for the stock. If, as argued by his Honor, Judge Hill, in delivering the opinion below, it required a vote to complete the contract (which we do not admit,) this question cannot be raised here. The recitals in the face of the bonds estop the defendant from raising the question. The law under which the power to issue the bonds is claimed is styled "An Act to Amend the Charter of the City of Aberdeen," and therefore the recital that they are issued under and pursuant to the charter, is a direct reference to the very act.

Burrough on Public Securities, p. 313.
Commissioners of Douglas Co. v. Bolles, 94 U.S. 104.
Commissioners of Johnson Co. v. January, 94 U.S. 202.
County of Warren v. Marcy, 97 U. S. 104.
Sykes v. Aberdeen, 59 Miss. 237.
Lynde v. The County, 16 Wallace 6.
Pendleton County v. Amy, 13 Wallace 305.

It seems to us that the language of the first section is too clear and plain for any doubt as to the power. The only question, it would seem, is as to the power to issue negotiable bonds in payment of the stock. The power to contract with the railroad for the stock was certainly conferred, and we insist, the authority to issue bonds, was by clear implication conferred.

Mark the language: "Empowered to contract with and subscribe for as many shares of the capital stock of said company, upon such *terms* and *conditions* as they may stipulate and agree upon."

Could broader and more comprehensive language have been used, authorizing the issuing of bonds in payment of the stock *contracted* and *subscribed* for as one of the *terms* and *conditions* of the contract, without in express words authorizing the issuing of bonds for that purpose?

It would seem not.

Webster says: "In *contracts*, *terms* in the plural are conditions, propositions stated or promises made, which when assented to or accepted by another, settle the contract and bind the parties."

In this act there are no limitations upon the power to contract, either expressed or *implied*. The words, *terms* and *conditions*, are used in their broadest sense. The language is "upon *such terms* and *conditions* as may be *stipulated* and *agreed upon*."

If there was no implied authority here given to issue bonds as a part of the contract authorized, we submit that it is impossible to give such power by implication.

IMPLIED POWER.

An examination of the authorities on the subject of implied power, we think will remove all doubt upon this question. The first case to which we would call the attention of the court is

Lynde v. The County, 16 Wallace 6.

This case was brought to this court by error to the circuit court of the district of Iowa, and involves the validity of certain bonds issued by the county judge of Winnebago county.

The question involved and decided is, whether the county judge had power to issue the bonds.

It was not contended that he had express power. The whole contention was as to whether he had *implied power*. The reporter, on page 8, quotes from Code of Iowa of 1851, all the law on the subject, which we quote in full:

"By section 129, the county judge as a county court, has power 'To provide for the erection and reparation of court-houses, jails and other necessary buildings, within and for the use of the county.'

"By sections 114–116, it is enacted: 'That the county judge may submit to the people of his county at any regular election, or at any special one, called for that purpose, the question, *whether money may be borrowed to aid in* the erection of public buildings.'

"When the question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes.

"No vote adopting the question proposed will be of effect unless it adopt the tax also."

This court, Justice Swayne delivering the opinion, says:

"In Hull & Argalls v. The County of Marshall, 12 Iowa 142, it was held that by virtue of his general authority, he might contract for the building of a courthouse, to be paid for out of the county revenue, but that when *a debt* was to be incurred for that purpose, special authority must be conferred by a popular vote in the manner provided by the statute. It was further held that when a loan was to be authorized, the form of the securities not being prescribed, negotiable bonds might be issued. The statute provides that the judge may submit to the people, at a regular or special election, 'the question *whether money may be borrowed* to aid in the erection of public buildings,' and other questions not necessary to mention; and that 'when the question so submitted involves the borrowing of money,' it 'must be accompanied by a provision to lay a tax for the payment thereof,' and that 'no vote adopting the question proposed will be of effect unless it adopt the tax also.'"

This case was tried upon the facts in the court below (a jury being dispensed with) and not upon demurrer. The reporter, as to the vote and issuing of the bonds, gives the facts in the following language, p. 9:

"These provisions of the Code being in force, Robert Clarke, the county judge of Winnebago, submitted to the

voters of the county, at a special election held on the 6th day of March, 1860, the question of levying a tax of seven mills on the dollar, for the purpose of building a courthouse, the said tax to be levied annually, not exceeding ten years, until a sufficient amount was raised for said purpose. The whole number of votes at the election was twenty-nine, of which twenty-four were in favor of the proposition.

"No proposition was ever submitted to the voters to *borrow money* for that or any other purpose. The county judge then made a contract with Martin Bumgardner, to build a courthouse for the county, and on account of the contract made and delivered to him on the 9th day of March, 1860, bonds in the name of the county for $20,000, the amount for which the courthouse was to be built."

Upon the facts the court proceeds to say:

"Upon looking into the record in this case, we find that the question submitted to the voters was, *whether the county judge*, at the time for levying the taxes for the year 1860, should levy a special tax of seven mills on a dollar of valuation, *for the purpose of constructing a courthouse in said county*, and said tax to be levied from year to year until a sufficient amount is raised for said purpose, not, however, to exceed ten years. There was the requisite majority in favor of the proposition. It was expressed in the formula that a courthouse was to be built, *and we think it was implied* that money was to be borrowed to accomplish that object. *Otherwise the vote gave no authority and was an idle ceremony.* The statute authorized an appeal to the voters only that they *might give or refuse authority to incur a debt*. It could not have been intended that the erection should be delayed until a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year. What is *implied is as effectual* as what is *expressed*. Viewing the subject in the light of the *statutory provisions* and of the action of the people,

we *cannot say* that the bonds were issued *without due authorization.*"

The Supreme Court of Iowa, in Hull & Argalls v. The County of Marshall, 12 Iowa 142, quoted and approved by this court, had construed this statute and "held that, by virtue of his (the county judge's) general authority, he might contract to build a courthouse, to be paid for out of the revenue of the county, *but that when a debt was to be incurred for that purpose, special authority must be conferred* by a *popular vote* in the *manner provided by the statute.*"

Any debt contract not to be paid out of the revenue of the county would not be binding. Previous authority by a vote was essential, and a contract without it would be void. How was this authority to be obtained? The question, and the only one authorized to be submitted by the statute was, "*whether money may be borrowed to aid in the erection of public buildings.*" No such question was submitted. The only question submitted was in the language of this court, "*whether the county judge*, at the time of levying the taxes for the year 1860, should levy a special tax of seven mills on the dollar of valuation for the purpose of constructing a courthouse in said county," &c.

Now we insist that the question which should have been submitted to the voters, "whether money may be borrowed to aid in building a courthouse, and a tax levied to pay the same, etc.," and the one submitted "whether a tax should be levied for the purpose of constructing a courthouse," are wholy different. Yet the county judge immediately made the contract with Bumgardner, and within three days issued and delivered the bonds to him on account of the contract.

No proposition to borrow money had been submitted, and under the ruling of Judge Hill in the court below in this case, the most that Bumgardner could have claimed, would have been payment out of the taxes as they were col-

lected, during the ten years for which they were to be levied. This court took a different view and said :

" There was the requisite majority in favor of the proposition. It was expressed in this formula, that a *courthouse was to be built*, and we think it was *implied* that *money was* to be *borrowed to accomplish the object*. The statute authorized an appeal to the voters, only that they might give or refuse authority to *incur* a *debt*."

We with great confidence, submit that the authority to contract for stock " upon such *terms* and *conditions* as may be stipulated and agreed upon," carries with it by a much *stronger implication*, the power to issue bonds in payment of the stock, than can by any fair and reasonable construction be drawn from this case, and yet the court uses this language :

" What is implied, is as effectual as what is expressed. Viewing the subject in the light of the statutory provisions and of the action of the people, we *cannot say* that the bonds were issued without *due authorization*."

We submit that Lynde v. The County is a strong case in our favor, and upon the facts it seems to us it ought to be conclusive.

It may be and no doubt will be said by opposing counsel, that the case did not go off on the question of implied authority to issue bonds. We answer that the court rested the case and decided it upon this question. After thus deciding the case, the court adds :

" But if the *authority* were doubtful, there are other facts bearing upon this point, which, in our judgment are conclusive. The county judge is the officer designated by the statute, to decide whether the voters have given the required sanction. He executed and issued the bonds, and the requisite popular sanction is set forth upon their face. It is a settled rule of law that, where a particular functionary is clothed with the duty of deciding such a question,

his decision in the absence of fraud or collusion is final. It is not open for examination, and neither party can go behind it. Here the bonds are in the hands of a *bona fide* purchaser, and under the circumstances, he was not bound to look beyond the averment on their face."

A careful inspection of the recitals in the bonds in our case, in connection with recitals in the bonds in the Lynde case will, we feel confident, satisfy the court that what is last quoted above applies with equal force to our case, and as before stated, is an authority estopping defendant from setting up want of authority to issue the bonds sued on.

The next case upon the subject of implied power to which we would call the attention of the court is,

Gause v. City of Clarksville, 5 Dillon C.C. 167, 168, 181.

We quote from the case:

"The act, which is alleged as the authority for the subscription by defendant to the stock of said road companies, and the issue of the bonds, is found in Session Acts of 1857, page 302, and reads as follows:

"Section 1. 'The city council are hereby authorized and empowered to levy, assess and collect a direct tax on all real estate within the city limits, not to exceed two per cent. per annum, for the purpose of aiding in the construction of macadamized or other roads leading from Clarksville to any other point in the State; and for the purpose of securing the building of such roads they may cause subscriptions of stock to be made by the city to any company now organized, or which may hereafter be organized, to construct such roads.

"Sec. 2. 'All dividends that may be declared to the city of Clarksville by any one company upon stock paid in from the special tax authorized by the first section of this act shall be by the city council paid over to the real estate owners paying the tax in proportion to the amount of tax respectively paid by them.'

"The question raised by the demurrer to these counts, is, whether the city had the *power*, under this act, to issue the bonds in payment of stock subscribed by it, and when they became due, to issue other bonds for money borrowed to pay them."

This demurrer raises the very question involved in our case.

The court decided that these bonds were good, delivering an opinion which we here produce in full, both because it is directly upon the point at issue and is short:

"The other class of bonds known as 'road improvement bonds,' were issued in renewal of bonds issued by the city in payment of stock subscribed to certain companies organized to build gravel roads from the defendant city to points in Missouri. Subscription to the stock of such companies was expressly authorized by the act of the Legislature of February 24, 1857, (Acts 1857, p. 302,) quoted at large in the statement of the case. Under the true construction of this act, in view of the general legislation of the State of Missouri at this period on the subject of municipal aid to railway and other companies, the almost universal practice, under such legislation, to issue bonds for debts of this kind, the practical construction put upon this act by the city, the special nature of the authority given, the limited amount of tax authorized by the charter to be laid for the ordinary uses of the municipality, and the decisions of the Supreme Court of the United States as to the implication of the power to issue bonds to pay for stock subscriptions to railways, and the general tenor of the judgments of the Supreme Court of the United States on the subject (Lynde v. Winnebago Co., 16 Wall. 612; Police Jury v. Britton, 15 Wall. 572; Dillon on Municipal Corporations, secs. 106, 107, 407, and notes,) and that the inference of the power to issue bonds is in no way inconsistent with the provisions of the act, my judgment is, that the city was authorized to issue bonds in payment for

the stock subscribed in those companies; that it would be liable to a general judgment on such bonds, and that on those bonds falling due they might be renewed by other bonds."

This case is very similar to the one at bar, and if Judge Dillon was right, there can be no question as to the power to issue the bonds in our case.

We would now call the attention of the court to the fact that in the Lynde case *supra*, it was decided that the vote submitted gave the *implied* power to borrow money, when in fact the borrowing of money was not contemplated. The facts as found by the court warrant this conclusion. The vote was taken on the 6th, and the bonds were issued on the 9th of March, "in fulfillment of a contract entered into with Martin Bumgardner." Is it not clear that the terms of the contract and mode of its payment were agreed upon before the vote was taken? The question really submitted to a vote "*whether a tax should be levied for the purpose of constructing a courthouse in said county*," with the further fact that the bonds were actually prepared and delivered to him (the contractor) three days after the vote was taken, go far to show, if they do not conclusively establish the fact that no borrowing of money was actually contemplated, and are extremely *persuasive*, if not conclusive of the fact that the terms of the contract had been agreed upon before the vote was taken. Yet the court decided that the vote gave the *implied* power to borrow money, and from this *implied* power draws the further implied power to issue bonds—an *implication* upon an *implication*.

We submit that our case needs and calls for no such double implication—the one founded upon the other. The power to contract and subscribe for the stock is clearly conferred. No limitation, no restriction upon the power. It certainly will not be insisted here that the words "upon such *terms and conditions* as may be stipulated and agreed

upon," were intended as a restriction upon the power to contract. Such a construction we submit is absurd, and cannot be sustained upon any rule of construction known to the law or common sense. The only *implication* we invoke is the *implied power* to issue the bonds and deliver them to the railroad in payment of the stock as one of "*terms and conditions* stipulated and agreed upon" by the parties. This is what was contracted to be done and what was done, and we submit was as fully authorized as could possibly have been done, without in express words authorizing the *issue of bonds* in payment of the stock. In our case the city of Aberdeen borrowed no money nor attempted to do so, sold no bonds nor attempted to, but "used the credit of the corporation in contracting directly for the accomplishment of an object authorized by law; so that by no possibility could the consideration of the debt be diverted to any illegitimate purpose."

American Decisions, vol. 30, 190.

That the power to borrow money carries with it by implication the power to issue coupon interest-bearing bonds, is too well settled in this court to require any citation of authorities.

Gelpcke v. The City of Dubuque, 1 Wallace 202.
Mayor v. Muscatine, 1 Wallace 385.
Mitchell v. Burlington, 4 Wallace 273.

"A municipal corporation has the implied power to borrow money for the objects authorized by its charter—as building markets, providing fire engines, etc.—it is not obliged to wait until the money can be collected by taxation."

Wills v. Gleason, 11 Wisconsin 470.
Bank v. Chillicothe, 7 Ohio (part 2, 31) (1836.)
30th American Decisions, p. 185, note pp. 190, 191.

The power to borrow money by municipal corporations includes that of giving bonds or other usual securities to the lender."

Commissioners v. Pittsburg, 34 Pa. St. 496.

"The Pennsylvania act of July 9, 1853, authorizing certain counties to *subscribe to* the capital stock of the Northwestern Railroad Company, and providing that counties may 'make payments on *such terms* and in *such manner* as may be agreed upon by said company and the proper county,' confers full authority upon the counties to *issue coupon bonds* in payment of such subscription."

Adams v. Lawrence Co., 2 Pittsburg (Pa.) R. 160.

This case seems to decide the very question involved in our case, which we are now considering, and the very question is expressly decided in the case of The Mayor, etc., of Griffin, et al., v. Inman, Swann & Co., 57 Ga. 370. The court in delivering the opinion, refers to the syllabus of the case as its own language, deciding this question, which is in these words:

"The authority to subscribe for stock, borrow money and impose future taxes, *embraces* an *implied power* to employ the usual and appropriate securities for engaging municipal credit in such cases, which securities are corporate bonds and negotiable on delivery. It was competent to deliver them at par in payment of the stock subscription in lieu of raising money upon them by loan, and then paying the money in discharge of the subscription, the one mode being substantially the equivalent of the other, when consummated by consent of both contracting parties. That certain conditions prescribed by an ordinance of the city as preliminary to the right of the railroad company to receive the bonds *had been complied with*, was *determined affirmatively* by the Mayor and city council, and such determination is binding in the present controversy."

As before said, although this language is in the syllabus, it is the language of the court as stated at the close of the opinion.

This language would apply with great appropriateness to the facts of our case, and is an authority for us upon the question of implied power to issue the bonds.

We cite the following cases as sustaining the authority of the city of Aberdeen to issue the bonds from which the coupons sued on were clipped:

Lynde v. The County, 16 Wallace 6.
Gause v. Clarksville, 5 Dillon 168, 181.
Rogers v. Burlington, 3 Wallace 654.
Police Jury v. Britton, 14 Wallace 282.
Gelpcke v. City of Dubuque, 1 Wallace 175.
Meyer v. City of Muscatine, 1 Wallace 384.
Mitchell v. Burlington, 4 Wallace 273.
Commissioners v. Pittsburg, 34 Pa. St. 496.
Mills v. Gleason, 11 Wisconsin 470.
American Decisions, vol. 30, p. 185, note pp. 190, 191
Adams v. Lawrence Co., 2 Pittsburg (Pa.) R. 160.
Seybert v. Pittsburg, 1 Wallace 272.
The Mayor, etc., of Griffin, et al., v. Inman, Swann & Co., 57 Ga. 370.
Commission's of Johnson Co. v. Thayer, 94 U.S. 631
Clemens on Corporate Securities, and authorities there cited, 26, 27, 28.
Curtis v. The County of Butler, 24 How. 448.
Sturtevants v. City of Alton, 3 McLean 393.
Milners, admr., v. City of Pensacola, 2 Wood's C.C. 632.
James v. Milwaukee, 16 Wallace 161.
Van Hostrup v. Madison City, 1 Wallace 296.
Burrough on Public Securities, pp. 173-4-5-6-7.
Ketchum et al. v. City of Buffalo, 14 N. Y. 356.
Commissioners v. Pittsburg, 41 Pa. St. 278.
County of Moultrie v. Rockingham.
Ten Cent Savings Bank, 92 U. S. 631.

"Power vested in municipal corporations to make all contracts which it might deem necessary for the welfare of the city, includes authority to issue bonds."

Black et al. v. Cohen et al., 52 Ga. 623.

The facts in this last case as stated by the court, are these: "By the 13th section of the original charter of the

city of Rome, the defendant (Rome) had special power to make all contracts which it might deem necessary for the welfare of the city. All contracts would necessarily include contracts under seal, and a bond is nothing more than a contract under seal."

The court on page 627, speaking of the issuing of bonds to pay for the stock, says: "The authority of the Mayor and council to subscribe for stock in the respective companies, necessarily implied that it was to provide the means to pay for it; paying for the stock subscribed was the most important part of the whole subject matter."

In that case, as in ours, the stock was paid for by issuing the bonds of the city payable to bearer, and delivering them to the complainant in payment of the stock, and on page 629 the court uses this language: "In our judgment, the defendant had the lawful authority to issue the bonds complained of in the complainant's bill; and if the same were irregularly issued by the defendant, or if any of them were negotiated and sold for less than ninety cents in the dollar, the defendant is bound to pay them and interest thereon to the innocent holders. In support of our judgment we cite the following authorities:

"Knox v. Aspinwall, 21 Howard 544.
Bissell v. City of Jefferson, 24 Howard 298.
Mercer Co. v. Hackett, 1 Wallace 94.
Gelpcke v. Dubuque, 1 Wallace 175.
City of Lexington v. Butler, 14 Wallace 294.
Moran v. Commissioners of Miami, 2 Black 722."

The court further says: "The application having been made in this case to a court of equity to restrain the defendant from levying and collecting an extraordinary tax for the payment of the interest due on the bonds, the question naturally presents itself, where were the complaining citizens of Rome when the stock subscription to the railroad companies was made and the bonds issued by the

defendant in payment thereof? Why did they not interfere *then* to restrain the defendant from subscribing for the stock and issuing the bonds of the city, if the defendant was violating its duty, as they now allege? Why remain quiet and passive until the bonds had been issued and sold, and were in the hands of innocent holders thereof? In view of the facts in this case, we may well question whether a court of equity should not hold that they are now estopped from setting up the grounds of their complaint at this late day as against innocent holders of the bonds; at any rate, a court of equity will not lend a very willing ear to their complaint now.

"We reverse the judgment of the court below in granting the injunction enjoining the levying and collecting of any extraordinary tax to pay the interest coupons attached to the bonds issued by the Mayor and city council of Rome to pay the stock subscription in the North & South Railroad Company of Georgia."

The language of Justice Bradley in the 14th Wallace case, p. 582, on *implied power to issue bonds*, is:

"We do not mean to be understood that it requires in all cases express authority for such bodies (municipalities) to issue negotiable paper. The power has been frequently implied from other express powers granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its payment, whether in the form of notes or bonds, payable in the future. So the power to *subscribe for stock in a railroad*, or to purchase property for a markethouse, and other like powers, which cannot be carried into execution without borrowing money or giving *obligations payable in the future*, have been held sufficient to raise the implied power to issue such obligations."

It requires no argument to show that the object contemplated by the act of 1858 could not possibly be accomplished by the city of Aberdeen without "borrowing money

or giving its obligation payable in the future." The *intent* was to give to the city authority and power to aid in the construction of any railroad which, in the opinion of its Mayor and Selectmen, would contribute to and build up the commerce of the city. For this purpose she was authorized to contract and subscribe for stock to the amount of $100,000. This she undertook to do, and upon due consideration subscribed the full amount of stock authorized, and issued her bonds in payment thereof—the amount of stock and bonds being the same, $100,000.

The court will take judicial cognizance of the fact that by the census of 1860, a little more than a year after the passage of the act under which the city was authorized to act, the population of the city of Aberdeen was only , and the assessed value of her property was only $, and that by the census of 1870, the year the bonds were issued, the population was 2022, and the assessed value of the property was $

Present and immediate aid is what is always required in the construction of railroads. Future aid or promised aid extending through a number of years in the future, cannot in such case meet the emergency and accomplish the end desired. This was well known to the Legislature and to the citizens of Aberdeen. The idea of levying a tax of $100,000 to be immediately collected or to be collected in a short time, is simply absurd; and the idea of extending the tax through a number of years and expecting the railroad to wait for the taxes until they were annually collected, is equally absurd, and could not have been contemplated by the Legislature. Present aid was certainly *intended*, and this could only be given by issuing her bonds and putting them upon the market, or delivering them directly to the railroad in payment of the stock.

Under all the rules of construction known to the law, the object intended could be accomplished only in this way.

Under all the authorities we submit that the implied power to issue the bonds is clear.

The case of Ketchum v. Buffalo, 14 N.Y., cited above, is a case where the city was authorized to "establish and regulate markets," to purchase market grounds, and where there was nothing in the charter or general law of the State forbidding the purchase to be made on a credit. The city made the purchase of two lots for market grounds on 27th of December, 1853, for the sum of $35,000, from one Austin, and executed and delivered to him in payment for the lots a bond payable to bearer on the 27th of December, 1878, bearing interest from date at seven per cent. per annum, payable semi-annually. The court decided that the city had the *implied power* to issue the bond, and after discussing with great clearness and force the question of the *implied power* of municipal corporations to issue bonds, closes the case upon this point by using the following pointed language:

"If, then, the city of Buffalo had power under its charter to purchase the ground for a market, it had authority so far as the charter is concerned, to do so upon a credit to which there was no limit but its discretion, and the right to give the single bill in question would follow as a necessary consequence. Power to *contract* a *debt* must carry with it power to give a *suitable acknowledgment* of the indebtedness in the form, either of a promissory note or a single bill. I can conceive no well grounded rule which would concede one of these powers and deny the other, and no such distinction is narrated by the cases."

In the note found in American Decisions, vol. 30, p. 193, commenting on this case, we find the following language:

"In that case, the city of Buffalo possessing the power to 'establish markets,' purchased in pursuance thereof a market site, and gave therefor a written evidence of indebtedness of the amount of thirty-five thousand dollars, payable in twenty-five years, bearing interest in the meantime

at the rate of seven per cent; the power was upheld. It might appear at first view that this differed little from borrowing, for it surely could have mattered little to the city that she directly contracted a debt to A, or that she paid him immediately with funds borrowed from B. The difference however, is this, that in the case put, the credit of the corporation is used in contracting directly for the accomplishment of an object authorized by law, so that by no possibility can the consideration of the debt be diverted to any illegal purpose."

The next and last case to which we will specially refer is Seybert v. Pittsburg, 1 Wallace 272.

This case arose upon the construction of an act of the Legislature authorizing a city to subscribe for stock in a railway company "as fully as any individual." Under this act stock had been subscribed and bonds issued in payment thereof, and the question was whether there was implied power to issue the bonds in payment of the stock.

While this case was pending in this court, the case of Commonwealth v. Pittsburg, 41 Pa. St. 278, was pending in the Supreme Court of Pennsylvania, involving the same question.

Before this case was finally decided in this court, the case in the Supreme Court of Pennsylvania was decided, in which a carefully prepared, elaborate and able opinion was delivered, in which the question of implied power in municipal corporations to issue bonds was carefully considered. The language used in the case was this:

"The power given to the corporation to subscribe, was a power to create a debt, and consequently to give an evidence of the debt. The power given was to subscribe as fully as an individual, and as an individual (by agreement with the company) could have given his bond, the city corporation had the same powers. Grants of powers to corporations are strictly construed in favor of the public, but it would

be a perversion of the rule to permit a corporation to use it to defraud its creditors, or to protect itself against its own assumed obligations. If they legally owe the debt, it follows that they can give a bond for it."

When Seybert v. Pittsburg came on to be heard in this court, the court was so well satisfied with the decision just quoted from, that they sustained the *implied* power to issue the bonds, and after quoting the language above quoted; Justice Greer, delivering the opinion, said: "As this court fully concur in the construction of the act made by the highest tribunal of the State of Pennsylvania, it is unnecessary to make further remarks."

Seybert v. Pittsburg, 1 Wallace 274.

Wells v. Board of Supervisors, 102 U. S. R. 625.

We think we have shown clearly that the first section of the act of 1858 authorized the issue of the bonds in controversy in payment for the stock. But it was contended below, and no doubt will be here, that the second section of said act points out the mode of payment, and this mode excludes all others, and consequently prohibits the issue of bonds for that purpose. Counsel, with apparent confidence, cited and relied upon Wells v. The Board of Supervisors, 102 U. S. R. 625, in support of this position. We submit that this case does not decide the question in our case, but that on the contrary it is an authority in our favor. The facts and law of that case are wholly dissimilar to ours. Our case is much more like the case of Lynde v. The County supra than the Wells case. The court in the Wells case, Chief Justice Waite delivering the opinion, on p. 631, referring to the Lynde case upon this very point, uses this language:

"Undoubtedly sec. 17 authorized a subscription to the stock of the railroad company for the county after a majority of the electors of the county had, in the proper way, given their consent, and it is *possible* if there had been

nothing more, that, under the rule of construction stated in Lynde v. The County (16 Wall. 6), the subscription might have been paid in bonds."

The language just quoted with great propriety may be used in reference to our case. After using this language, the court proceeds to show and does clearly show that the act under which the bonds were issued in that case never contemplated the issue of bonds. The court does not put its decision *merely* upon the ground that a tax was authorized to be levied and collected to pay for the stock, as will appear from a careful examination of the case. The reasoning of the court is clear and may be briefly stated as follows. There was no authority conferred upon the Board of Supervisors to issue the bonds of the county:

1. Because the enabling act expressly provided that no stock was to be issued until the taxes authorized to be levied were *paid* to the railroad company.

2. Because the act provided that the certificates of stock were to be issued to the taxpayers upon the *payment of their taxes*.

3. Because there was no provision that certificates of stock were to be issued to the county.

4. Because stock could only be issued for the actual amount of the *taxes paid* and *when paid*.

5. Because there was no authority to levy and collect a tax to pay any interest.

6. Because the law in that case gave no authority to contract an interest-bearing debt, and consequently the Board of Supervisors exceeded their authority in this particular, in contracting a debt of $390,000, $240,000 of which was interest.

7. Because in thus exceeding authority a debt of $240,000 was attempted to be made when there was no authority to make it and no authority to levy a tax to pay it.

For these reasons the bonds in the Wells case were declared void, none of which can be applied to our case. As

before said, our case on this point is very much more like the case of Lynde v. The County than the Wells case, and the remarks of the court above quoted as to the Lynde case apply with appropriateness to our case. The court in the Wells case says that secs. 17 and 18 of the act of March 10, 1852, are to be considered with the supplemental act passed on the 19th of April following, using this language:

"These sections are to be construed in the act of 1859 precisely as they would be under the act of 1852, except so far as they may have been modified by the other provisions in 1859. The original act of 1852 is to be considered in connection with the supplemental act passed a little later. Being *in pari materia* and enacted at the same session of the Legislature, they are to be taken together as one law. From the supplemental act it is apparent that the object of the Legislature was to raise money by taxation to aid in the construction of the road, and to require the company to give the *taxpayers stock for the money they paid.*"

This is entirely inconsistent with the idea of the payment of interest, &c.

Now we submit that our case has none of the elements in it which made the bonds in the Wells case void.

In our case we think we have demonstrated that under the 1st section of the act of 1858, there was authority to issue the bonds in payment of the stock as one of the "*terms and conditions stipulated and agreed upon in the contract of subscription.*"

The proper and reasonable construction of the second section is that the Legislature intended to authorize the levy and collection of a tax to enable the city of Aberdeen to carry out in good faith her contract made under the first section. This, we submit with confidence, is the only reasonable and fair construction of the act of 1858.

We confidently submit, that if the first section authorized the issue of the bonds, (and this we think is clear,) it

is an absurdity, both upon principle and reason, to say that the mere authority to levy and collect a tax to enable the municipality to comply with the contract previously authorized to be made, can have any effect upon the power to contract previously given. There must be something more in the clause authorizing the levy and collection of the tax to make it have this effect, as in the Wells case. The power to levy and collect a tax in all such cases, as a necessary sequence, follows the power to contract. To give a municipality the power to contract a debt and not at the same time give it the power, by taxation, to comply with its contract, we suppose was never done, and never will be. No Legislature would be guilty of such folly.

We submit, that in our case, thsre is nothing in the second section which, upon any fair or reasonable construction, was intended to change or in the least modify or limit the power to contract, clearly given in the first section, and we do not believe that any authority can be found which will sustain such a construction. We think we have conclusively shown that the Wells case does not bear such a construction. Chief J. Waite's reasoning in delivering the opinion, is too clear on this point, to admit of doubt.

pp. 630–31–32 and 33.

The Wells case, we submit, is clearly an authority for us. The stock in that case, was issued to the county, when it should have been issued to the taxpayers. It was issued before the tax was paid, which was expressly prohibited by the law. An obligation for $390,000 was incurred where only one of $150,000 was authorized. Whereas, in our case, the stock was issued to the right party. The contract was in strict accordance with the law. The bonds were issued under the contract which was authorized, and there was a clear recognition of the right to issue the bonds by the acts of defendant in paying a portion of the coupons and by holding the stock certificates to this hour.

All of these differences between our case and the Wells case completely denude it of all force as an authority against us.

It is an authority for us, that if the first section "*authorized a subscription of stock to the railroad company, * * * and if there had been nothing more, that under the rule of construction stated in Lynde v. The County, (16 Wall. 6), the subscription might have been paid in bonds.*"

In our case "*nothing more*" was contained in the second section than what was essential to enable the defendant to comply with the contract it was authorized to make by the first section. The language of the second section is that the taxes authorized to be levied were "to be applied to the payment of the aforesaid *subscription of stock* as *provided in the first section of this act.*"

RATIFICATION.

We now come to the second question: Has the issuance of the bonds in controversy been ratified and confirmed by the subsequent acts of the city of Aberdeen, or by a subsequent act of the Legislature of the State of Mississippi.

Upon the first proposition, we rely upon two facts which are alleged in the declaration, and which are admitted by the demurrer.

That the city had received the certificates of stock from the railroad for the payment of which the bonds were issued, and has retained the same without complaint until the bringing of this suit. The declaration charges, that the bonds were issued in *payment for the stock*, and the ordinances recite, that the bonds are to be delivered and the stock received therefor. So the presumption on demurrer is, that the city now has the stock, and that seven of the coupons upon the bonds had been detached and paid before plaintiffs had for value became the owners of the bonds and coupons. The coupons alleged to have been paid represent interest

on the bonds for three and one-half years. These acts we submit under all the authorities, amount to a ratification and confirmation of the contract made by the Mayor and Selectmen of the city of Aberdeen for the stock. By the express terms of this contract, the stock was paid for by issuing bonds payable to bearer for the amount of the stock and delivering them to the railroad company. The ratification of the contract, necessarily ratifies and confirms the issuing of the bonds. In support of this position, we cite the following authorities:

Clemens on Corporate Securities, pp. 53, 54 and 55.
Supervisors v. Schenck, 5 Wallace 781.
1 Bissell 319.
Pendleton County v. Amy, 13 Wallace 305.
March v. Fulton County, 10 Wallace 684.
Loan Association v. Topeka, 20 Wallace 667.
United States v. Dandridge, 12 Wheaton 70.
9 Wallace 414. 1 Bissell 536. 3 Wallace J. 271.
Leavenworth v. Barnes, 94 U. S. 70.
Johnson County v. January, 94 U. S. 202.
Hoyt v. Thompson, 19 N. Y. 218.
Peterson v. New York, 17 N. Y. 453.
Keithsburg v. Frick, 34 Ill. 421.
Stanly v. Life Ins. Co., 11 Paige Ch. 635.
F. & M. Bank v. B. & D. Bank, 16 N. Y. 129.
Goodman v. Simmons, 20 Howard 365.
Thompson v. Lee Co., 3 Wallace 327.

The doctrine is well settled that municipal corporations have no powers except those which are conferred upon them expressly or by implication. Some of the authorities use the words necessary implication, whilst others use the word convenient instead of necessary. All of the authorities which use the word *necessary* agree that they do not mean, by the use of this word, to say that the case must be such that objects of the corporation cannot be attained without the use of the implied power. Even if the object

could be attained without the use of the implied power, yet if the methods by which it could be done, without its use, are so cumbersome as to be practically inoperative, the cases all hold that the implied power may be invoked and used. Hence, the power to borrow money carries with it the power to issue coupon interest-bearing bonds for its repayment, and the authority to purchase grounds for a market carries with it the authority to issue in payment of the purchase a twenty-five years interest-bearing bond.

14 N. Y. 356.

By virtue of their general powers, municipal corporations have no power to subscribe for railroad stock and issue bonds in payment thereof. There must be an enabling act, either in the charter or elsewhere, before such power can be exercised. If the power can be drawn from the enabling act, no matter what conditions precedent to the exercise of the power may have been omitted, or how irregular or improperly the power may have been exercised, yet the thing done pursuant to the power contained in the enabling act may be ratified and confirmed by the subsequent acts or conduct of the municipality or its officers. This doctrine, we think, is amply sustained by the authorities cited.

As before stated, there can be no question as to the power to contract for the stock having been given in the enabling act, and we think we have demonstrated that as an incident to that power there was full authority to issue the bonds in payment of the stock.

If this power was irregularly or improperly executed, we think it clear that the subsequent acts of the defendant in receiving the stock and holding it without complaint until the bringing of this suit, and the further act of paying three and one-half years' interest upon the bonds amounts

to a ratification, and estops the defendant from objecting to the validity of the bonds.

Supervisors v. Schenck, 5 Wallace 781.
1 Bissell, 319.
Pendleton Co. v. Amy, 13 Wallace 305.

The case of Supervisors v. Schenck uses this language:

"Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed, or if the contract was illegal, immoral or against public policy. Like an individual, a corporation may ratify the acts of its agents done in excess of authority, and such ratification may in many cases be inferred from acquiescence in those acts as well as from express adoption (19 N. Y., 218). Such ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name, and it was held in Peterson v. The Mayor of New York (17 N. Y., 453), that the principle is as applicable to corporations as to individuals. When the officers of a corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority for the purpose, and other corporate acts subsequently performed, show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. All the acts of the board of supervisors of the county in making the subscription, purchasing the shares, issuing the bonds and exchanging the securities, appear to have been open and well known to the corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, *and actually paid the* same, as admitted in the special

plea. Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent ratification is as good as a previous authority can be more justly applicable than in the case under consideration. So, when *shares* in a *railroad company were received* by the *officers* of a *county* in *exchange for their bonds, and* were *never returned*, and the proper officers of the county voted for directors at two elections, and the supervisors paid two annual installments of interest, the Supreme Court of Illinois held that these acts unexplained, were as satisfactory evidence of a design to ratify the issue of the bonds as if it had been done by an order of the supervisors (Johnson v. Starke County, 24 Illinois 90). Direct decision to the same effect was also made by that court in Keithsburg v. Frick (34 Ill. 421), which is the latest reported decision on the subject. Views of the court in that case were that the acts of the supervisors in issuing the bonds and putting them upon the market, and by levying taxes and paying interest for a series of years, estopped the county from setting up any irregularity in their issue, and *this* court has in repeated instances, affirmed the same doctrine."

The court further on says: "When a corporation has power, under *any circumstances*, to issue *negotiable securities*, the decision of this court is that a *bona fide* holder has a right to presume they were issued under circumstances which gave the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper."

In the case of Pendleton County v. Amy, supra, 13 Wallace, the court on pages 304–5–6, Strong, J., delivering the opinion, discusses this question at length, from which we quote:

"Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue bonds in payment; and if it does, the purchaser

of such bonds is affected by the want of authority to make them. But it does not follow that when the Legislature has given its sanction to the issue of the bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can be *always* avoided in the hands of innocent purchasers by proof that the county officers, or the people, have not done the things which the Legislature required to be done before the authority to subscribe or to issue the bonds should be exercised. A purchaser is not always bound to look further than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law, and what the vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed in favor of an innocent purchaser of the bonds that the conditions which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist, but *such acts* and such recitals are sufficient to protect *bona fide* purchasers against an attempt to set up non-compliance with the conditions attached to the grant

of power to issue bonds; it is not easy to see why the pleadings do not show an estoppel in this case. The county *received* in *exchange* for *the bonds* a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was brought, and which it still holds. Having *exchanged the bonds for the stock, can it retain* the *proceeds* of the *exchange* and assert against a purchaser of the bonds for value, that though the Legislature empowered it to make them and put them upon the market upon certain conditions, they were issued in disregard of the conditions? We think they cannot, and therefore that the third plea cannot be sustained."

We would call attention to the fact that Aberdeen received the stock in exchange for her bonds more than twelve years before the bringing of this suit, and that she has paid interest on the bonds for three years and one-half. Seven of the coupons had been clipped and paid before this suit was brought. Now if power can be drawn from the enabling act to issue bonds, which we think has been demonstrated, the acts and conduct of the defendant have ratified and confirmed their issue, and it will not now be heard to raise the question of the illegality of their issue.

CURATIVE ACT.

The curative act of 1872 (act of 1872, p. 214), we insist, cures all defects (if any) in the contract of subscription and in the issuing of the bonds in controversy in payment of the stock contracted for. The fourth section of this act is in these words:

"SEC. 4. *Be it further enacted*, That all subscriptions to the capital stock of the Selma, Marion & Memphis Railroad Company, made by any county, city or town in the State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed."

The railroad here mentioned is the same as the one to which the bonds were issued. The name of the corporation was changed by the act of August 8, 1870 (acts 1870, p. 556):

"SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the name and style of the railroad company which was incorporated by the Legislature of the State of Mississippi and approved on the 20th day of February, A.D. 1867, as the 'Memphis, Holly Springs, Okolona & Selma Railroad Company,' shall hereafter be known and styled as the 'Selma, Marion & Memphis Railroad Company.'"

So it is clear that this curative act applies to the bonds and coupons in question.

The rule as to the ratification of contracts made *ultra vires* by the officers of a municipal corporation by the subsequent acts or conduct of the corporation through its officers, is different from the rule as to the ratification and confirmation of such contracts by an act of the Legislature. In the one case the first-named contracts, made with an entire want of authority, cannot be subsequently ratified, legalized and confirmed by the corporation or its officers. On the contrary, such contracts can be legalized, ratified and confirmed by subsequent legislative action. Judge Cooley, in his valuable work on Constitutional Limitations, on page 379, states the rule very clearly in this language:

"We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the *contract was one which the Legislature might originally* have authorized, the case falls within the rule we have laid down, and the legislative action is to be sustained. Some of the cases where municipal subscriptions in aid of railroads were held valid were cases where the original undertaking was without authority of law and was confirmed by retrospective act of legislation."

Judge Cooley, in a note, cites the following authorities, which fully sustain the text:

McMillan v. Boyles, 6 Iowa 330.
Gould v. Sterling, 23 N. Y. 457.
Thompson v. Lee County, 3 Wallace 327.
Bridgeport v. Housatonic R. R. Co., 15 Conn. 475.
Board of Commissioners v. Bright, 18 Ind. 93.

On page 224, 225, Judge Cooley, speaking on this subject, says: "And if a municipal corporation shall have voted money for such purpose without legislative authority, it is competent for the Legislature afterward to legalize their action if it shall so choose." Here also Judge Cooley discusses the question fully in his note. In the case discussed in his note, a municipal corporation had without *any authority* of law voted an appropriation of money, and Judge Cooley after discussing the case fully, uses this language:

"The court were therefore of opinion, that it was competent for the General Assembly to pass votes in reference to all drafted men of the State like those which this town had passed, and that it was equally competent for them to delegate that power to the towns, and *of course* to authorize the towns to ratify votes of that character which they had before adopted."

After this comment upon the case of Booth v. Town of Woodbury, 32 Conn. 118, he cites the following authorities:

Bartholomew v. Harwerton, 33 Conn. 408.
Crowell v. Hopkinton, 45 N. H. 9.
Shackford v. Newington, 46 N. H. 415.
Lowell v. Oliver, 8 Allen 247.
Ahl v. Gleen, 52 Pa. St. 432.
Meister v. Hode 52 Pa. St. 474.

An examination of these authorities satisfies us that they fully sustain Judge Cooley, and that the law is correctly stated by him. Clemens in his excellent work on Corporate Securities, under the head of Curative Acts, on pages 41 and 42, states the doctrine fully thus:

"But bonds irregularly issued, may be valid even in the hands of purchasers with notice of the defects in their issue; and even though *void* for this reason when purchased, they may be subsequently validated in the hands of the purchaser, and become binding municipal obligations. These results may be brought about by the passage by the Legislature of a curative act. Such acts have been uniformly sustained by the Supreme Court. Whenever the question has been presented, the ruling has been that in cases of *bonds issued* by *municipal corporations*, under a *statute* upon the *subject*, ratification by the Legislature is in all respects equivalent to an *original authority*, and cures all defects of *power*, if *such defects existed*, and all irregularities in its issue," citing:

Beloit v. Morgan, 7 Wallace 624.
Thompson v. Lee County, 3 Wallace 331.

The language of Clemens, is that the curative act "*cures all defects* of *power*."

Our point is that if there was any defect of power to issue the bonds in our case, the act of 1872 cures it. We think we have demonstrated that there was no defect of power to issue the bonds, but if mistaken in that position, "*all defects* of *power*" are *cured* under these authorities, and the defendant is bound.

This doctrine has been recently considered by this court, and fully sustained by the recent cases of

Thompson v. Perrine, 103 U. S. 806.
Louisiana v. Taylor, 105 U. S. 454.
Johnson County v. Thayer, 94 U. S. 631.

In the case of Thompson v. Perrine, 103 U. S. Supra, bonds were issued by a municipal corporation in payment of stock in a railroad company *without any authority whatever*. The bonds were utterly *void* in the *hands* of *all persons*. This question had been settled by the court of last resort in the State and by this court. The Legislature, by

a curative act, *ratified* and *confirmed* these *void bonds*. This court held the curative act *constitutional;* that the Legislature had full power in the premises, and that the bonds were thereby *validated* and made binding upon the municipality in the hands of all persons.

We think we have correctly stated the well-settled doctrine in this and other courts as to the effect of curative legislative acts upon contracts made by municipal corporations *ultra vires*, whether there is an absolute want of power under any circumstances to make the contract, or whether the want of power results from a failure to comply with the required conditions precedent or subsequent, or whether it results from an irregular or improper exercise of the power. In all of these cases it is competent for the Legislature, by a *curative act*, *to cure* the defect and make the void or voidable contract, as the case may be, binding upon the municipality. This court will enforce the collection of bonds and coupons, in all such cases, where the Legislature has, by express act, "*legalized*, *ratified* and *confirmed*" the contract under which they were issued. The authorities we submit amply sustain the doctrine as stated.

This doctrine is founded upon elementary principles. Municipalities are the creatures of the Legislature. The Legislature can make or destroy them at will. Their powers are all derivative—derived directly from the Legislature. They have no inherent powers and indeed can have none.

The Legislature can make contracts for municipalities and enforce them. It can levy taxes directly upon municipalities and collect them, provided the same is done for what is recognized as a public purpose. That contracts are usually made, and taxes levied and collected by municipalities under powers conferred upon them by the Legislature can make no difference. The right to delegate power, can only result from the *possession* of the *power delegated*. If the principal can delegate *power* and exercise it through

its agents, it necessarily follows that the principal can exercise the power, delegated *directly*, without resort to an agent.

From this necessarily results, the well founded distinction between the ratification of contracts made by municipalities, by their subsequent acts or conduct, and the ratification of such contracts by curative acts of the Legislature.

This is the foundation of the distinction. The one can "*legalize, ratify* and *confirm*" a void contract, because it had the power *originally* to *authorize* the contract, whilst the other cannot "*legalize, ratify* and *confirm*" the void contract, because no power had been delegated to it to make the contract. This distinction is recognized by the authorities and is founded upon sound principle. If the Legislature had originally the right to authorize the contract, it could originally have made it, and consequently can ratify the contract made by its agents, *ultra vires*.

CONSTITUTION OF 1869.

It may be contended that art. 12, sec. 14, and art. 13, sec. 1, of the constitution of Mississippi, adopted December 1, 1869, repealed the act of 1858, under which the bonds in question were issued, and that all contracts made and bonds issued under said acts after December 1, 1869, were *ultra vires*, because in conflict with the Constitution of 1869, and that no subsequent act of the Legislature *can* "legalize, ratify and confirm them."

The Constitution of Missouri of 1865, article 11, sections 3 and 14, is in substance the same as the Constitution of Mississippi of 1869.

The Mississippi Constitution is in these words:

"ART. 12, § 14. The Legislature shall not authorize any county, city or town to become a stockholder in or loan its credit to any company, association or corporation, unless

two-thirds of the qualified voters of such county, city or town, at a special election or a regular election, to be held thereon, shall assent thereto."

"ART. 13, § 1. All laws in force in this State not enacted in furtherance of secession and rebellion, and not repugnant to this Constitution, shall continue in operation until they shall expire by their own limitation or be altered or repealed by the Legislature. * * *"

This Constitution went into effect December 1, 1869.

The Missouri Constitution is in these words:

"ART. 11, § 3. All statute laws of this State now in force, not inconsistent with this Constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly. * * *"

"ART. 11, § 14. The General Assembly shall not authorize any county, city or town to become a stockholder in or loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

This Constitution went into effect in July, 1865. It will be seen that the two constitutions are identical in substance and almost so in language.

It is well settled by the repeated adjudications of this court that the Missouri Constitution of 1865 did not repeal acts of the General Assembly of Missouri passed previous to its adoption which conferred upon counties, cities and towns authority to subscribe stock in railroad companies, or in the least affected such powers, and that contracts of subscription and bonds issued subsequent to the adoption of the Constitution under such acts were binding, and that the general law passed under this Constitution did not affect in the least such previously granted powers, and the

contracts made and bonds issued even after the general law under the new Constitution, are good.

County of Callaway v. Foster, 93 U. S. 567.
County of Scotland v. Thomas, 94 U. S. 682.
County of Henry v. Nicolay, 95 U. S. 619.
County of Ray v. Vansycle, 96 U. S. 675.
County of Schuyler v. Thomas, 98 U. S. 169.
County of Cass v. Gillett, 100 U. S. 585.
Sonsa v. Taylor, 105 U. S. 458.
Supervisors v. Galbreath, 99 U. S. 214.

The last case above was a Mississippi case. The facts were these: The Legislature of Mississippi, by an act approved Feb. 10, 1860, authorized the county of Calhoun to subscribe stock to a railroad company, "provided a majority of the voters of the county signified their approval." A subsequent act, approved March 25, 1871, authorized the county to issue bonds in payment of subscription to stock under the act of Feb. 10, 1860. Under the first act there was a vote authorizing the subscription, and the bonds were issued September 1, 1871. The court held in harmony with its previous decisions under the Missouri Constitution of 1865, that the county was bound for these bonds, and she was forced to pay them, thus giving the same construction to the Mississippi Constitution which it had so often given to the Missouri Constitution, and refers to the cases which had settled the question in this court.

In our case the bonds were issued April 26, 1870. The new Constitution had gone into effect Dec. 1, 1869. The Legislature after the adoption of the new Constitution and previous to the issuing of the bonds, had passed no act on the subject. The bonds were issued under the act of November, 1858. There had been no act previous to their issue, amending, repealing or in any manner affecting the act of 1858. The new Constitution, as just shown, had no effect upon the act or upon the power conferred by it. The act of 1858, with all the powers which it conferred, was,

on the 26th of April, 1870, as effectually in force as when first passed, and the Mayor and Selectmen of Aberdeen had *then* all the power and authority under the act which they had at any and all times before the adoption of the new Constitution, Dec. 1, 1869. Hence it necessarily follows that any curative act, passed subsequent to the issue of these bonds, which upon its face "*legalizes, ratifies and confirms*" "all subscriptions to the Selma, Marion and Memphis Railroad Company," must and does "legalize, ratify and confirm" the subscription made in this case. Hence the act of 1872 applies, and the subscription of stock to the railroad company by the defendant is binding by reason of this *curative act*, whatever irregularities or *defects of power* may have existed when the contract of subscription was made.

We must then look to the contract of subscription to ascertain what was "legalized, ratified and confirmed."

This is clearly set forth in the declaration and admitted by the demurrer. The contract is set forth in the ordinances which are copied in our declaration. In substance it was that the Mayor and Selectmen of the city of Aberdeen subscribed for $100,000 of stock, and paid for the same with $100,000 of her bonds. This contract was consummated by the city officials delivering to the railroad company the bonds and receiving therefor the stock.

This was the "subscription;" and this "subscription" is legalized, ratified and confirmed by the act of 1872. This it seems to us is conclusive. Was there a subscription for stock? Nobody will deny this. Can the subscription be separated from the issuing of the bonds? Can Aberdeen retain stock and repudiate the bonds? Will she be heard to repudiate her own contract deliberately made, and say to the Legislature, We are superior to you and are not bound by your curative act. Innocent purchasers of our bonds must suffer; there is no power in the Legislature to prevent it. The act of 1872 cannot affect us. We submit

with confidence that this court will tolerate no such position, and will hold that the curative act of 1872 applies and cures all defects of power (if any) to issue the bonds, and will hold the defendant liable to plaintiffs, who are innocent purchasers for value, without notice of any defects or want of power in the defendants to issue the bonds.

MUNICIPAL CONSTRUCTION.

It is well settled by repeated adjudications of this and other courts, that municipal corporations are bound by their decisions in construing acts so as to give them power, under which they have made contracts and issued bonds. This doctrine is applied with great rigor, as to bonds in the hands of innocent purchasers.

Clemens in his work on Corporate Securities, uses this language on p. 28:

"Even if it be doubtful whether the corporation has power to issue bonds, yet if the municipal authorities have construed their charter as giving the power, and the bonds have been issued and are in the hands of *bona fide* purchasers for value, the court will adopt the municipal construction," citing:

Van Hostrup v. Madison City, 1 Wall. 297.
Meyer v. City of Muscatine, 1 Wall. 391.
James v. Milwaukee, 16 Wall. 162.
Adams v. Lawrence County, 2 Pitts. (Pa). R. 64.
Woodhull v. Beaver County, 3 Wall. Jr. 278.

"The corporation having acted upon its own construction, and drawn in others to take the securities and advance their money upon it; it will be concluded from denying that construction to be the true one."

Same authorities.

"So strictly is this doctrine adhered to, that where a law is *capable* of a construction that would authorize the issuance of bonds, and bonds had been issued and passed

into the hands of innocent purchasers, it was held that though the court would, upon proper application have enjoined the issuance of the bonds, because of *vagueness* and ambiguity of the *statute*, yet the municipal authorities would be held to their construction of the *law* in favor of the *bona fide* holder.

"Woodhull v. Beaver County, 3 Wallace Jr. 274.
Adams v. Lawrence County, 2 Pittsburg R. 64."

The two last cases above cited by Clemens in support of his text, fully sustain the text.

The question in both cases was whether authority had been given by the Legislature to issue the bonds in suit, not whether the power to issue the bonds was dependent upon any conditions precedent or subsequent which had been omitted, but whether the power under any circumstances existed—could it by any fair construction be drawn from the act.

The syllabus of the first case, Woodhull v. Beaver County, is in these words:

"A court will frequently issue process to prevent acts being done on the ground that they are unauthorized, which same acts after they are done, the court will enforce as having been made in pursuance of the authority sufficiently given. Ex. gr. It will hold a county bound to pay its bonds actually issued and negotiated by it under authority assumed from an ambiguously and ill-expressed statute, although had any citizen of the county applied for an injunction to restrain the issue, on the ground of a want of authority, clearly given by the statute, the court would have granted such preventive remedy."

The court, Mr. J. Grier delivering the opinion, after discussing fully the question of legislative authority to issue the bonds, uses this language:

"If a citizen of Beaver county had chosen to dispute the construction assumed by the commissioners, both of

the *statute* and report, the courts were open. He could have asked for an injunction, and *we* would have granted it. But when all the parties have given their construction of the *act*, and it can by its terms be made to include the *power*, the court will not exercise astutia to give it a stringent interpretation in order to enable the county to disown its obligations after having received their value. New trial refused."

The case of Adams v. Lawrence County is equally as strong and to the same effect.

The case of Van Hostrup v. Madison County, 1 Wallace 291, supra, recognizes the principle decided in the case of Woodhull v. Beaver County, 3 Wallace Jr. supra, quoted above.

The question in that case was whether there was any authority under any circumstances to issue the bonds sued on. The court after examining the statute carefully, came to the conclusion and decided that the statute did confer the power, and after having so decided, Justice Nelson delivering the opinion on page 297, recognizes the principle of the Woodhull case in this language:

"Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question, even if the case *had been doubtful*, inasmuch as the city authorities have given *this construction* to the *charter*, and bonds have been issued, and are in the hands of *bona fide* purchasers for value. *We should have felt bound* to *acquiesce in it*."

Meyer v. The City of Muscatine, 1 Wallace 384, recognizes the principle on p. 391. Justice Swayne delivering the opinion of the court.

The question in that case was whether the city had the authority to make the contract, not where the want of

authority was on account of the omission of some condition, but whether the city under any circumstances had the power. The court held in favor of the power, and after so deciding, uses this language:

"If the subject admitted of doubt, *we should hold that the city* having acted upon its own construction, and drawn in others to take the securities and advance their money upon it, it is *now concluded* from denying that construction to be the true one."

The case of James v. Milwaukee, 16 Wallace 159, is on this point exactly similar to the cases cited, and it recognizes the principle on page 162, in these words:

"The construction practically given by the parties interested, as evidenced by their conduct, is in harmony with the views we have expressed, and is not without weight."

This case cites Meyer v. Muscatine, supra.

So the doctrine decided in the Woodhull case that municipalities who have construed a doubtful statute, as giving them power to issue bonds, and have under that construction issued bonds, will be held liable for said bonds in the hands of innocent purchasers for value, has been distinctly recognized by this court in at least three cases.

We have found no express adjudication in this court on the subject, because as we believe there has been no case before the court demanding it.

If this court should have any trouble in finding power in the act of 1858 to issue the bonds and coupons (which we cannot conceive), or if there should be any doubt as to the curative effect of the act of 1872)which we think impossible), then we invoke this doctrine, believing it to be sound, and that this court will so hold.

The Supreme Court of Mississippi recognizes this doctrine in Lombard v. Vicksburg, 51 Miss. 124. Simrall, J., delivering the opinion, uses this language:

"If it were doubtful therefore whether the express power were conferred (and we think it is not) after the city authorities had placed their construction on the law that they had the power, and after the Legislature that granted the charter has placed the same construction upon it, the courts should conform to this practical interpretation as settling the doubt."

ESTOPPEL.

The doctrine of estoppel against municipal corporations, where bonds have been issued by them under their charters or under enabling acts of the Legislature without complying with conditions incident to and required before the issue of the bonds, and the doctrine that such municipalities are estopped as to all irregularities and omissions of such conditions by recitals on the face of the bonds in the hands of innocent purchasers for value, are so well settled by a long line of decisions in this court, commencing at Aspinwall v. Knox County, 24 Howard 376, and coming down to date, that it is hardly necessary to cite the authorities.

This doctrine is accurately and clearly stated in a late Mississippi case which we quote:

"As to matters of fact, constituting the conditions for the exercise of the power conferred to issue bonds, purchasers might rely upon the recitals in the bonds, but as to the terms of the *act conferring the power*, they were bound to look to the act itself, and not to any *misrepresentations* or *misinterpretations* of it contained in the recitals of the bonds. They are to read as if the act authorizing their issuance was embodied in them, and any material variance from the act makes them void."

Woodruff v. Okolona, 57 Miss. 810.

The same principle is stated in 56 Mississippi, p. 123, thus:

"If there exists legislative authority, not in conflict with

the State or Federal constitution, to issue the bonds, and they are duly executed by proper officers, who are invested with authority under the law, with power to decide *whether conditions precedent have been performed*, and they so declare or recite, the issue of such bonds under such circumstances, and with such recitals is conclusive as to the facts so stated, and estops the municipality in a suit on the bonds to aver or prove to the contrary."

"Murray v. Township of Oswego, 92 U. S. 638.
Town of Coloma v. Evans, 92 U. S. 484.
Commissioners v. Nichol, 161 Ohio St. 260.
Moran v. Miami County, 2 Black 732.
Mercer County v. Hackett, 1 Wallace 83.
Supervisors v. Schenck, 5 Wallace 784.

"The doctrine is firmily established by the Supreme Court of the United States, and was distinctly recognized in this court in City of Vicksburg v. Lombard, 51 Mississippi 126, 127."

Cutler v. Board of Supervisors, 56 Mississippi 123.

The purchasers of the bonds in controversy were bound to look to the law, the act of 1858, for the power to issue the bonds. Beyond this, they were not bound to look. They were not bound to look to ordinances, or to see whether conditions precedent or subsequent had been complied with. They were only required to look to the law under which the bonds were issued, and if they found the power there, no matter what conditions precedent or subsequent to the exercise of the powers were required, they are safe. The bonds are *negotiable securities*, subject in hands of purchasers, only to the infirmity of a want of power to issue them. If the power existed under any circumstances, the innocent purchaser is protected and the municipality is estopped.

Simrall, J., in Lombard v. Vicksburg, 51 Miss. 127, uses this language:

"He (the purchaser) might well conclude also, that the

taxpayers, who had a deep interest in the matter, would closely watch the proceedings, and arrest them if the law was not complied with. *When the authority exists, mere irregularities do not affect the title of the* BONA FIDE *holder.*"

Bessell v. Jeffersonville, 24 How. 287.

Bank v. Rome, 19 N. Y. 20.

Gelpcke v. Dubuque, 1 Wallace 208.

Royal British Bank v. Turquand, 5 E. & B. 248a.

RECAPITULATION.

The doctrine of *Municipal Decisions* and of *Curative Acts*, deducible from the cases may be stated thus:

Was there a supposed enabling act? Have the municipal authorities construed the supposed enabling act as giving them power to issue bonds? Have they issued bonds under their construction of the act and put them upon the market either by sale or in exchange for stock which they were authorized to subscribe for? Have the bonds thus issued, come into the hands of innocent purchasers for value? If all of these questions are answered in the affirmative, the municipality is bound and the bonds are good. The taxpayers have a clear remedy before the bonds are issued, and afterward until they come into the hands of an innocent purchaser, by an injunction, and an appeal to the courts for a construction of the act under which they are issued. If they sit idly by and allow their own officers in a doubful case, upon their construction of the act, to issue bonds and put them upon the market or give them in exchange for stock, and thus they get into the hands of innocent purchasers, no subsequent decision of a court, holding that the supposed enabling act gave no authority to issue the bonds, will relieve the municipality from her liability on the bonds, in the hands of an innocent purchaser for value. This is clearly deducible from the authorities and is sound in principle. In such a case, to hold that the innocent purchaser must bear the loss would reverse the time-honored

and well settled equity doctrine, that where a loss must be sustained, the *innocent* will be protected as against the *guilty* or the *negligent*. In such a case the innocent purchaser needs no curative act. This is the true doctrine of municipal decisions.

Curative acts remedy all defects in the supposed enabling act. If the enabling act is ambiguous or doubtful as to the power conferred, and the municipality has upon its own construction exercised the power—issued bonds, for example—then the curative act cures all defects of power in the hands of all persons.

By relation the curative act takes effect from the date of the supposed enabling act, and makes the bonds in the hands of all persons as binding upon the municpality as if the enabling act had in express words authorized the issuing of the bonds. If the courts should ultimately hold that there was no authority under their enabling act to issue bonds, and there is no curative act, then nobody is protected as against the municipality, except the innocent holder of the bonds for value, purchased before the decision pronouncing them void. If on the contrary there is a curative act, it cures all defects in the bonds in hands of all persons, just as if the enabling act had expressly authorized the issue. The only question in such cases to be considered, is whether the original act thus validated by the curative act was at the date of its approval in conflict with the constitution. By relation the power to issue the bonds existed from the date of the first act; and this act, if not in conflict with the Constitution, remedies all defects of power.

SUMMARY.

We think that we have clearly shown that the Constitution of 1869 did not repeal, impair or in any way change or modify the act of November, 1858; that there was no act of the Legislature previous to the issue of the bonds, repeal-

ing, amending, or in any manner affecting said act; that said act clearly gave the implied power to issue the bonds; that the Mayor and Selectmen of Aberdeen so construed the act; that they under their own construction by solemn ordinance, issued the bonds and put them upon the market by delivering them to the railroad company in payment of stock; that they received the *quid pro quo*, which they contracted for, to-wit, the stock of the company; that they have retained the stock without complaint until the bringing of this suit and still retain it; that the plaintiffs are innocent purchasers of the bonds and coupons for value; that the enabling act of 1858 clearly authorized the Mayor and Selectmen to subscribe for the stock; that they did subscribe for the stock and incur the debt; that the contract of subscription was complied with by both parties, by an exchange of the bonds for the stock; that three years and a half of interest on the bonds have been paid; that the act of 1872 legalized, ratified and confirmed all subscription of stock to the railroad company, mentioned in the face of the bonds; that there was a *subscription*, and that act was intended to legalize, ratify and confirm the subscription as made; that without the issuing of bonds there was no subscription and with it there was; that the curative act by necessity, legalized, ratified and confirmed the issue of the bonds, because the subscription could not be ratified without ratifying the bonds; the one could not be separated from the other; and it inevitably follows that the bonds and coupons in question are binding upon Aberdeen, in favor of plaintiffs—

1. Because there was power originally to issue them.

2. Because Aberdeen is bound to innocent purchasers, because of her own decision that she had the power.

3. Because plaintiffs are innocent purchasers for value.

4. Because all supposed defects of power were cured by the curative act of 1872.

We confidently submit that the court below erred in sustaining defendant's demurrer, and that this court will reverse the court below, and overrule defendant's demurrer.

CRAFT & COOPER,
Counsel for Plaintiffs in Error.

ADDENDA.

I.

As to the first ground of demurrer, that there was no such corporation as the Memphis, Holly Springs, Okolona and Selma Railroad Company, we do not admit the conclusions drawn by counsel as to the effect of the slight discrepancy which crept into the act of 1867, but deem it unnecessary to be drawn into any discussion on that subject, because the existence of the corporation cannot be inquired into collaterally. The allegation in the declaration that it was duly and legally organized (record p. 2), coupled with the several legislative acts recognizing its existence, do at least make it out to be a *de facto* corporation.

II.

As to the question of the existence under the act of 1858, of power to issue negotiable securities, I can add nothing to the brief of our associate.

III.

The sixth ground of demurrer is, that there is no averment in the declaration, nor recital in the bonds, that an election was had approving the levying of a tax to pay the subscription as required by the act of 1858.

There *is* such an averment, both in the declaration and in the bonds.

It is charged in the declaration that the contract of subscription was made "under and in pursuance of, and in accordance with the act of 1858." (record p. 2).

To avoid prolixity in pleading, the rule now is, to give to the words of the pleader every reasonable intendment in their favor. Consequently when it is averred that a certain thing was done in accordance with a certain statute, that is, in conformity with it, it will be accepted as an averment that every essential thing was done which the statute required to be done. Upon the sufficiency of these averments, see *Lincoln v. Iron County*, (103 U. S. 412–417). In that case (bottom of p. 415) the declaration averred that the subscription was made in accordance with the act under which the power was given, and the court said (middle of p. 416): "But we do not think there was any defect in the declaration to be cured; we think it would have been good on demurrer." * * * "If there was any defence to them (the bonds) by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it."

IV.

So far as the incapacity of the treasurer to sign the coupons is concerned, it was in reality the act of the Mayor and Selectmen; they directed it in the ordinances.

Record page, 4, § 2.

V.

We come now to the curative statute of 1872, which is as follows:

"Section 4. *Be it further enacted* that all subscriptions to the capital stock of the Selma, Marion and Memphis Railroad Company made by any county, city or town in the State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed."

Approved March 16th, 1872.

Laws of Miss., 1872, p. 314.

On February 21, 1867, the name of the company was changed from that of the Memphis, Holly Springs & Mobile

Railroad Company to that of the Memphis, Holly Springs, Okolona & Selma Railroad Company.

Laws of Miss., 1867, p. 635.

And again, on the 21st of July, 1870, it was changed to that name by which it was designated in the curative act.

Laws of Miss., 1870, p. 566.

As if to remove all doubt concerning its intention to make the curative act of 1872 apply to the corporation therein mentioned, in sec. 1 of the curative act, the statute incorporating the company under its first name is spoken of as being the *original charter* of the company concerning which the curative act was passed. It is as follows:

"SEC. 1. That so much of sec. 2 of the original charter of the Selma, Memphis & Marion Railroad Company, entitled An act to incorporate the Memphis, Holly Springs & Mobile Railroad Company, approved November 23, 1859," etc., etc. The remainder of the act is immaterial.

So the statute which we have been calling the curative act, styled by the Legislature "An act to facilitate the construction of the Selma, Marion & Memphis Railroad," was by its very terms made applicable to that railroad company under all of its names.

EFFECT OF CURATIVE ACT.

In coming to a conclusion as to the effect of the act of 1872, we must first ascertain whether the Constitution of 1869 deprived the Legislature of the power of passing an act which would have the effect of ratifying (making valid) a contract of subscription attempted to be made in 1870 under the act of 1858.

Second, if that question is answered in favor of the existence of the power in the Legislature, we must then determine whether it was the intent of the Legislature, as expressed in the act of 1872, to validate such negotiable

securities as, under the contracts of subscription therein mentioned, had been issued in payment of the subscriptions thereby ratified.

I.

As to the power existing in the Legislature in 1872, let us ascertain what power the Legislature had on the 25th day of April, 1870, the day before the passage of the ordidance embodying the contract of subscription, because if on that day the Legislature had power, by way of amendment of the act of 1858, to provide, without any vote other than as therein required, that the city in subscribing thereunder might issue its bonds in payment of the subscription, then it had the same power at the date of the passage of the act of 1872; and if, at the latter date, it had power by way of amendment to authorize the *issuance* of bonds, then it could ratify and render valid bonds already issued.

The present question was decided in *The Supervisors v. Galbraith* (9 Otto 214). By an act passed in 1860, the Legislature of Mississippi had authorized counties to subscribe to the stock of a certain railroad upon a *majority* vote, but the act impliedly prohibited the issuance of negotiable securities to pay the subscription. In 1871, by way of amendment to the act of 1860, and without providing for any other vote than as previously required, the subscribing counties were authorized to issue their bonds in payment of any subscriptions they had theretofore or which they might thereafter make under the act of 1860. In September, 1871, Calhoun county issued bonds which recited that they were executed in payment of stock under the act of 1860 and the amendment of 1871.

The court in substance decided, First, That § 14, art. 12, of the Constitution did not repeal the act of 1860; that the authority therein given to subscribe on a *majority*, instead of a two-thirds vote, still remained; that the section in question was leveled at future grants of power by the Legislature to municipalities, and had nothing to do with

grants already made. Second, That the act of 1871, in authorizing the issuance of negotiable paper, had only dealt with the mode of payment: that is, that the *essential* thing, the thing prohibited by the Constitution (the authorizing of a county to become a stockholder in a corporation), had not been attempted in the act of 1871; that the grant of power, the authority to incur the debt, had already been made in the act of 1860, and in substance, that the act of 1871 merely declared what evidence of debt the county should issue of a liability not then incurred, it is true, but the incurring of which had already been authorized before the adoption of the constitutional inhibition.

To sum it up: if the Legislature had power in 1871 to authorize Calhoun County to issue bonds to pay any subscription that county might thereafter make under the act of 1860, then it likewise had power in 1870 to authorize the city of Aberdeen to execute bonds in payment of any subscription it might thereafter make under the act of 1858, and having power to authorize their *issuance*, it necessarily follows that it had power to ratify and make valid the bonds after their issuance, it being granted that the only infirmity in the bonds was the lack of that legislative sanction afterward given in the curative act of 1872.

SYKES V. MAYOR, &C., OF COLUMBUS.

The lower court was of the opinion that the above case (55 Miss. 115–145) was decisive of the question both as to the power of the Legislature to pass the curative act, and also of its intention. See record, p.

Let us examine this Sykes case.

The contract of subscription in that case was on the first day of November, 1869, attempted to be made with this same Memphis, Holly Springs, Okolona & Selma Railroad Company, and the 4th section of the act of 1872 was invoked as curing the want of power in the town to make the subscription and issue the bonds.

Prior to the adoption of the Constitution not a shadow of authority had ever been granted to the town of Columbus to become a stockholder in or to lend its credit to any corporation. It simply had the charter powers usually granted to a town for its good government.

See opinion of the Court, 55 M. p. 139.

Now all the court could decide under such a state of facts was that prior to December 1, 1869, no authority having been given to the town of Columbus to become a stockholder in or loan its credit to any corporation, that after that date it was incompetent for the Legislature to make such a grant of power, either originally or by way of ratification, without annexing to it the condition required by the Constitution. If the opinion of the court infimates any more than the above, it is to that extent *mere dicta.*

At the bottom of page 141, Simrall, J., says:

"*We must clearly have before the mind the precise question for solution. It might be conceded that the Legislature in 1872 might pass a curative act healing mere irregularities in the exercise of a power to subscribe or loan credit previously given; and still we must encounter the further question whether the Legislature could ratify and confirm a subscription or loan which had been made without previous legislative authority and before the Constitution became operative.*"

Now, he there distinctly says that this was the precise question for solution in the Sykes case: "Whether the Legislature could ratify a subscription made without previous legislative authority, and before the Constitution became operative."

Again, on the same page, he says:

"*For the very reason that the city of Columbus incurred this debt without legislative authority, the contract is without validity, and so continued to be until the passage of the act of 1872. That act has the effect of imparting validity to the bonds by retroaction, or it has none whatever. But before the Legislature*

came to act, the new Constitution intervened and prohibited its consent, except on conditions."

Here it will be observed that he ascribes the want of efficacy in the act of 1872, solely to the intervening of the Constitution between it and the object it was to cure, which was not merely the absence at the time of the contract, of power in the town to issue negotiable securities, to say what evidence should be given of a debt which the town was fully authorized to incur; but the total absence of authority to incur a debt at all—to become a stockholder. We think we have shown by the Galbraith case, *supra*, that the Constitution did not deal with the evidence of debt, nor with past grants of power to incur such; that it was the future grants of power to incur a debt, which were prohibited to the Legislature; that the power to become a stockholder having been granted to a given municipality, prior to the new Constitution, and without the condition of a two-third vote required by that instrument, it was perfectly competent for the Legislature thereafter to change the mode of payment, to authorize an evidence of the debt to be issued, which should differ from the one prescribed by the original act passed, prior to the Constitution.

At the top of page 142, he says:

"*The consequence is that a municipal subscription, or loan of credit to a railroad company, made before December, 1869, cannot be validated by the mere expression of legislative consent, or ratification ex post facto, but such obligations must stand or fall as the municipality had power or not to incur them.*"

We say that the municipality of Aberdeen had power before 1869 to become a stockholder, and that after that date the ability remained in the Legislature to say *how* it should discharge its liability as such, and that it was just as competent to do this by way of ratification, as by amendment of the original act before the contract was made.

On page 143 he says:

"*In Hawkins v. Carroll County, 50 Miss., it was not questioned that the Legislature might cure a defective or irregular exercise of a power previously granted; it might cure irregularity in the election, but it could not dispense altogether with an election.*"

In Hawkins v. Carroll County, the subscription was in 1873, under the general act of 1872, which act, in accordance with the constitutional requirement, made the assent of two-thirds of the qualified voters a condition precedent. Of course the Legislature could not *in that instance* dispense with the condition, but *only* because it was a thing required by the Constitution.

Again, on the same page, (143), he says:

"*The act of 1872 might, with great plausibility, be construed as embracing only municipal subscriptions and aids to railroad companies made after the Constitution was adopted. It confirms and ratifies those not in violation of the Constitution.*"

The Aberdeen subscription was made *after* the adoption of the Constitution, and we have shown under the *Galbraith* case, that it was not in violation of it.

We now desire to call especial attention to an anachronism in the opinion in this Sykes case, which when corrected, necessarily does away with all the arguments founded on it—arguments which seem to have exercised a controlling influence with the lower court in deciding the case at bar. At the bottom of the page (55 Miss. 143) is the following language used with reference to the curative act of 1872:

"*It (the act of 1872) might well be supposed to refer more especially to the act of 1870, which authorized counties, cities and towns to extend aid to railroad companies in whose enterprises they were specially interested, on complying with the terms of the Constitution. It is well known that aid was extended, or attempted to be, to railroad companies by many of the coun-*

ties, cities and towns under that act. The language of the law of 1872 indicates that it had special reference to obligations incurred under the act of 1870, when not incurred in violation of the Constitution."

Now as a matter of fact, the act of 1870 thus referred to as being in the legislative mind when it passed the curative act, was not thought of by the lawmakers, for the simple reason that up to that date no such act had ever been passed The date of the curative act is March 16, 1872, and between that date and the adoption of the Constitution in 1869, not only was there no *general act* passed by the Legislature authorizing counties, cities and towns to extend aid to railroads, but there was no special act of that kind applicable to the railroad in question. We have carefully gone through the published statutes of Mississippi, both of 1870 and '71, and could find neither a general law applicable to all counties, towns and railroads, nor a special act applicable to the railroad company mentioned in the curative act, either under its name as given in that act, or any of its former names. If we are mistaken in making this assertion, of course counsel will correct us and point out the book and page, as they are not given in the opinion of the court in the Sykes case. The first general statute enacted after the Constitution of 1869 on this subject, was approved April 19, 1872 (Laws of Miss. 1872, p. 120), being just one month and three days after the passage of the curative act. The decision in Sykes v. Columbus was rendered in 1877, and we can well see how it was possible for the court at that date to mistake the act of April 19th, 1872, as being passed in 1870. Indeed the error cannot reasonably be explained in any other way. But no matter how it is explained, whatever force there was in the dicta, is taken out of it, when we ascertain that there never was an act of 1870, and for that matter, nor of 1871 either, to which the curative act might be referred. It follows, then, that in passing the curative act of 1872, the Legislature did *not* have reference to obligations incurred under the act of 1870, and

did *not* have reference to subscriptions and loans incurred since the adoption of the Constitution, under statutes enacted after that instrument became operative, but did, as is therein said, have reference to all subscriptions to the capital stock of that particular railroad company not made in violation of the Constitution.

Sykes v. Columbus, then, is no authority to be followed in this case:

1. Because so much of the opinion as has been relied on as applicable to the case at bar is mere *dicta*, and besides it is unsound and fallacious. We do not understand that the *dicta* of a State court is to have any more controlling influence in the construction of a State statute or Constitution than it is to have on any other subject. Of course we recognize the *general rule* as to the binding efficacy given State *decisions* in the construction of statutes.

2. Because there was not even a pretense of construction of the curative act of 1872 until October, 1877, and the bonds and coupons in the case at bar were purchased by the plaintiffs in 1874, before maturity and for value. If, in 1874, a proper construction of the act of 1872 rendered the bonds valid, no erroneous construction placed upon the act after the purchase of them by plaintiffs could invalidate them and divest the plaintiffs of their contract rights. In 1874 the plaintiffs, in purchasing the bonds, construed the act of 1872 and the power of the Legislature to pass it at their peril, but if they construed it properly they will be protected in it. There is a privity of contract between the maker and each successive holder of commercial paper, and if in this instance it was competent for the Legislature to cure the want of power in the maker, and there was such a legislative intent authoritatively expressed, then we cannot see why there was not thereafter a privity of contract between the city of Aberdeen and each successive purchaser of the bonds. If we are correct in this, then the question becomes a federal one, fully as well defined as in

Butz v. Muscatine (8 Wall. 575), where the bonds in question were issued and purchased before the Supreme Court of Iowa had construed the statute under which the authority to execute them was claimed. We do not understand that *Butz v. Muscatine* has ever been overruled. On the contrary, as to the point in question, it has been referred to and distinguished, and thereby impliedly approved in Supervisors v. United States (18 Wall. p. 82).

II.

Was it the intention of the Legislature to make valid negotiable securities in cases where they were issued in payment of stock as a part of the contract of subscription?

A subscription is a contract. If you ratify a subscription, then you have ratified a contract. If you ratify a contract, you have ratified all of it; or, to express it otherwise, it is not permitted to ratify a portion of a contract. But, it may be replied, that such only proves that the act of ratification was nugatory. Not so. We admit such would have been the case if the Legislature had said, "we ratify the subscription," and had added, in express terms, "but in doing this we distinctly refuse to ratify the bonds." The presumptions are: First, That having said they ratified the subscription—the contract—that they meant the entire contract. We mean, that this is the presumption when the contrary is not expressly stated. Second, The courts will not presume that the Legislature meant to attempt what it could not do—that is, ratify as to a part; make the contract binding on the railroad according to the very terms of it, and leave the obligation of the city to take some other shape totally different, not merely in form, but in substance, from the one mutually agreed on—the one assented to by the railroad.

If an agent has purchased property for his principal, and the principal says, "I ratify the purchase," then he thereby ratifies the negotiable security, which, under the contract

of purchase, the agent, in his, the principal's name, has executed in payment for the property.

To put it syllogistically—

A contract cannot be ratified in part; all of its terms must be approved.

Story Agency, § 250.

A subscription is a contract:

Therefore a subscription cannot be ratified in part; all of its terms must be approved.

Hence we have the following:

Where a ratification is established as to part, it operates as a confirmation of the whole.

Story Agency, § 250.

It is not to be questioned that the Legislature did ratify a part—the subscription—the obligation of the railroad to deliver its certificate of stock to the city, and the right and duty of the city to receive it.

Therefore, the Legislature ratified, legalized and confirmed the remainder of the contract—those terms regulating the mode and time of payment of the subscription, to-wit: the negotiable securities, which the ordinances embodying the contract of subscription directed the Mayor to deliver at the time that he should receive the railroad's certificate of stock.

Do not understand us to say that in *all* instances of municipal subscriptions with bonds issued in payment thereof, the subscriptions are inseparable from the bonds. That depends upon the contract. Sometimes the agreement of the corporation to issue its stock, and of the municipality to issue its bonds in payment thereof, are parts and parcels of one entire and original contract. And on the other hand it has frequently occurred that the contract of subscription is made in such terms as not to involve the issuing of any negotiable paper, and afterward such contract is modified,

or attempted to be modified by the parties, as to provide for the issuance of bonds. Now we are free to admit that in such cases it may happen that the original contract is binding, while the modification is invalid: that the subscription may stand, and the bonds fall. But the case under discussion, as made in the declaration, clearly and distinctly puts it, that the subscribing and the issuing of the bonds sued on are parts and parcels of one entire contract.

If it should be alleged in a declaration, "that on the—— day of———, A had purchased certain property of B, and did then and there agree to deliver his promissory note in payment for such property, and that afterward A, in pursuance of his contract of purchase, had executed and delivered to B his promissory note in payment thereof;" would not such allegations be interpreted as charging one entire contract, a single, indivisible, ~~inseparable~~ inseparable transaction? Without the property, there would be no consideration for the note—without the note, B would be parting with his property for nothing.

In order to show clearly just what the allegations are on this subject, we may be excused for quoting the several parts of the declaration bearing thereon:

The declaration alleges:

First. "That on the day of 18 , the Mayor and Selectmen did subscribe, etc., etc., and did *there and then* agree to issue in payment of such subscription, the twenty years corporate coupon bonds," etc., etc.

Record page 2 .

Second. "That afterward, on the 26th day of April, 1870, the Mayor and Selectmen in pursuance of their said contract of subscription, did make and execute, and did then and there deliver in payment of said subscription, two hundred bonds," etc., etc.

Record page 2 .

Third. "That the bonds on their face recite that they are issued *in payment of stock*, etc., etc., under and pursuant to the ordinances passed on the 26th day of April, 1870.

Record page 2.

Fourth. The ordinances copied in the declaration, being the very contract of subscription, say: "That the Mayor and Selectmen do hereby subscribe the sum of one hundred thousand dollars to be paid in bonds," (Record p. , § 1) and they direct that "the Mayor shall hand the bonds over to the railroad, and receive therefor the certificate of stock."

Record p. 4, § 5.

It matters not whether the bonds when issued in pursuance of the contract of subscription were delivered to the railroad company on the same day as the date of the contract, or a year thereafter; so far as the entirety and indivisibility of the contract is concerned, they relate back to the date and circumstances of the agreement to issue them.

We think we have shown that the Legislature had the power, and expressed the intention by the act of 1872, to ratify the action of the Mayor and Selectmen in adopting a mode of payment for the stock authorized to be subscribed by the act of 1858, different from that therein specified, if indeed there was a lack of authority under the latter act to issue negotiable securities.

CALVIN PERKINS,

Of Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States.

—o—

KATZENBERGER'S SONS,

v.

THE CITY OF ABERDEEN.

—o—

Error to United States District Court for the Northern District of Mississippi.

—o—

Brief of SYKES & BRISTOW, Counsel for Defendant in Error.

STATE LEDGER PRINT, JACKSON, MISS.

In the Supreme Court of the United States.

KATZENBERGER'S SONS, Plaintiffs in Error

v.

THE CITY OF ABERDEEN, Defendant in Error.

ERROR TO DISTRICT COURT OF EASTERN DIVISION OF NORTHERN DISTRICT OF MISSISSIPPI.

Brief and Argument of Counsel for Defendant in Error.

This was an action of debt by plaintiff in error on coupons to bonds issued April 26, 1870, by the city of Aberdeen, in payment of subscription of $100,000, to capital stock of the Memphis, Holly Springs, Okolona and Selma Railroad Company.

The authority to issue these bonds is denied. We give the pertinent portions of the various Acts of the Legislature, claimed by plaintiffs to authorize the issuance of the bonds, and of other Acts which we will refer to by way of argument:

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1. Consolidated charter of Feb'y 25, 1854, Pamphlet Act 1854, page 216.

"SEC. 16. *Be it further enacted*, That the said Mayor and Selectmen in council, shall have power within the city, by ordinance, to levy and collect taxes upon real and personal property by law taxable for State purposes, not exceeding for general purposes one-half of one per cent., *ad valorem*, and for the support of public schools, not exceeding, altogether, the sum of $20,000; they may also, for general purposes, levy and collect a tax," etc; "and, also, with the consent, to be ascertained by ballot, of the qualified voters, to levy and collect such further taxes for *special purposes* * * * as may be found necessary from time to time, etc."

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2. Amendment of Feb'y 20, 1867, Pamphlet Acts, 1867, page 467, authorizing tax for *general* purposes of 100 per cent. on State tax, and taxes for *special* purposes *without election*.

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3. Amendment of Nov. 15, 1858, Pamphlet Acts, 1858, page 221. [We copy this Act in full, it being the law invoked in this cause].

"SEC. 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Mayor and Selectmen of the city of Aberdeen be, and they are hereby empowered to contract with the New Orleans, Jackson and Great Northern Railroad Company, or with any other Railroad Company, and to subscribe in the name, and for the use of the city of Aberdeen, as many shares of the capital stock of said company, and upon such terms and conditions as they may stipulate and agree upon, as they shall deem expedient, not exceeding in amount the sum of $100,000.

"SEC. 2. *Be it further enacted*, That the Mayor and Selectmen of said city of Aberdeen, are hereby empowered to levy and col-

lect a tax on all the property within the corporate limits of said city, subject at the time to State or county tax, and upon the annual gross incomes of all persons or corporations residing or doing business in the corporate limits of said city, to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this Act; *Provided*, That before such tax shall be levied the same shall be approved by a majority of the legal voters of said city, to be ascertained by an election held as other elections in said city.

"SEC. 3. *Be it further enacted*, That the said tax shall be levied and collected as other taxes of said city, and the tax collector is hereby required to execute a bond, with good security, to be approved by the said Mayor and Selectmen, *conditional*, for faithful performance of his duties as such collector, and that he will pay over the monies collected, as directed by the said Mayor and Selectmen. And such tax collector shall receive for his services one per centum on the amount collected, and no more.

"SEC. 4. *Be it further enacted*, That the gross amount of the annual income of each and every person and corporation residing or doing business within the corporate limits of said city, shall be ascertained by the said tax collector, who, for such purposes, is authorized and required to administer an oath to each person, or his agent, or the proper officer of a corporation, as [to] the amount of his, her or their annual income; and any person will fully swearing falsely, as to the amount of such income, shall be deemed guilty of perjury, and upon conviction thereof, shall be punished as in other cases of perjury.

"SEC. 5. *Be it further enacted*, That this Act shall take effect from and after its passage.

"Approved, November 15, 1858."

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4. Amendment of October 22, 1866, Pamphlet Acts, 1866, page 86:

"SEC. 1. *Be it enacted by the Legislature of the State of Missis-*

sippi, That the Mayor and Selectmen, of the city of Aberdeen, be, and they are hereby authorized to issue the bonds of said city, to the amount of one hundred and twenty-five thousand dollars, for the purpose of completing, or aiding in the completion, of that part of the New Orleans, Jackson and Great Northern Railroad, between the said city of Aberdeen and the Mobile and Ohio Railroad,"

(Sections 2 and 3, regulate the details of the issuance of the bonds provided for in section 1.)

"SEC. 4. *Be it further enacted*, That the Mayor and Selectmen are hereby authorized to levy and collect a tax upon all taxable property within the corporate limits of said city, and upon all incomes, business, or other things now taxable by law, for the purpose of paying said bonds and interest."

"Approved, Oct. 22, 1866."

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5. Amendment of August 8, 1870, (under Constitution of 1870) Pamphlet Acts, 1870, page 446.

SEC. 2. Authorizes subscriptions to stock in Railroad Company, on a two-third's vote in favor thereof.

SEC. 3. Provides for the election to be ordered on petition of 25 voters.

SEC. 4. Authorizes bonds with interest coupons to be issued to pay the stock so subscribed, and for the assessment and collection of a tax, "from time to time," to pay interest as it falls due, "and to extinguish the bonds as they respectively fall due."

These last two amendments, of Oct. 22, 1866, and Aug. 8, 1870, are not cited as being claimed to confer any authority to issue the bonds in controversy in this suit, but only by way of illustration and argument.

The Declaration claims authority from the *Act of Nov.* 15, 1858, copied in full, *supra*, (under the clause authorizing contracts &c., with "any other Railroad Company.") Our demurrer, which was sustained by the Court, denies the authority claimed, and sets up other objections to the validity of the bonds sued on.

We do not propose to burden the Court with either volume of argument, or array of authority. The question has been presented so often, that we may assume the Court is thoroughly saturated with it, and we don't think there can be conceived a case involving the validity or regularity of a Municipal Railway Aid Bond, that has not been practically settled in some of the decisions, from *Knox Co. v. Aspinwall*, 21 *How.*, decided in 1858, down to *Merchants Bank v. Board of Freeholders*, decided Nov. 16, 1885, and not yet reported.

We take it to be settled that, in absence of *express* authority to municipal corporations to issue *commercial paper* in discharge of a legal obligation, that authority will never be *implied*, in the following cases.

1. Where it is not reasonably *necessary*.

2. Where contemporaneous legislation and financial history show the issuance of commercial securities was not contemplated by the Act authorizing the incurring of the obligation, but that some other mode of payment *was* contemplated.

3. Where the authorizing Act prescribes another and different mode of payment.

4. And, *a fortiori*, where the mode of payment prescribed by the authorizing Act is commercially and financially *inconsistent* with the issuance of commercial securities.

All these circumstances unite in this case to condemn the bonds here sued on.

I

That the issuance of commercial securities in this case was not *necessary*, is proven by the simple fact, which is a matter of State history, that Aberdeen *did* subscribe $100,000 to the capital stock of the Railroad Co. named in the Act of 1858, (The New Orleans, Jackson and Great Northern R. R. Co.) paid its stock

by simple taxation, and the money paid therefor, was used in grading and buying the iron for a section of said road, adjacent to the city. This was in 1859 and 1860.

II

Up to the year 1866, we look in vain for any legislative authorization of issuance of *bonds* or commercal securities in aid of railways or other public works, by the Mississippi Legislature. In many instances, counties and towns were authorized to *subscribe capital stock* in limited amounts, but the first instance of *bonds* being authorized, is the Act of October 22, 1866, copied *supra*, authorizing the City of Aberdeen to issue bonds to complete an important section of the very Railroad named in this Act—the New Orleans, Jackson and Great Northern R. R. From the action of the Legislature, we may assume that *this body* did not construe "the power to *contract* with the New Orleans, Jackson and Great Northern Railroad Company," contained in the Act of 1858, as empowering the city to issue commercial paper, as the only object of said Act is to *confer* that power.

Up to 1866, Railroads had been built in Mississippi, in some instances, with the aid of counties and towns along their lines, but no bonds or other commercial paper had ever been issued; the aid extended, or the capital stock paid, was by simple *taxation*.

By the 16th section of the charter of 1854, a method was prescribed for the authorities of the City of Aberdeen to raise money for ordinary city purposes and public schools, and also for any *special* purpose, and this method was by *simple taxation*, (the *special* purpose being required to receive the sanction of a popular vote before the tax could be levied.)

The amendment of February 20th, 1867, cited *supra*, while raising the limit of the tax for general purpose, and abolishing the condition of a popular election for tax for a *special* purpose, still confines the method to *taxation*.

It is only in August, 1870, after the new constitution of 1870 went into effect, *and after these bonds were issued*, that the Legisla-

ture authorized the city to issue *bonds* in payment of subscriptions to stock of Railway Companies, Act of August 8, 1870, cited *supra*.

We submit, therefore, that contemporaneous history and legislation establish the fact, that no authorization of commercial paper was in the legislative mind in passing the Act of Nov. 15, 1858, but that the method contemplated was that by which the city was already empowered by law to raise money for ordinary and extraordinary purposes—*simple taxation*.

III

This view of the Act of November 15, 1858, we submit, is overwhelmingly sustained by an examination of the Act itself.

By the 1st section power is given to the city to *contract* with the New Orleans, Jackson and Great Northern Railroad Company or any other Railroad Company; and to subscribe $100,000, or less, of capital stock "upon such terms and conditions as they may stipulate and agree upon."

There are here two separate clauses: the authority to "*contract*" with any Railroad Company; and the power to *subscribe capital stock*.

It was claimed below by counsel for plaintiffs, that the power to *contract* necessarily *implied* the power to issue commercial securities; and it was earnestly argued that this view was sustained in *Lynde v. Supervisors*, 16 *Wall*, 6. In fact, this constituted the strength of the argument of counsel for plaintiff in the lower court. But, since the argument of this cause below, this court has expressly held, in *Claiborne Co. v. Brooks*, 111 *U. S. Rep.* 400, that a power in a municipal corporation to issue commercial paper will *not* be implied from legislative authority to *contract* for anything. *See on page* 406.

The bonds in that case were issued in payment for a court house for Claiborne county, and the statute authorized the county to "acquire and hold property for county purposes, and make all *contracts* necessary or expedient for the management, control

or improvement thereof;" also, "to *contract* for and superintend the erection of the new jail and court house."

This court held that these statutes did not authorize the issuance of commercial paper, arguing (page 406) that if it did, counties generally having power to *contract* for ordinary county purposes, would be alllowed to flood the market with commercial paper against which they could set up no defense. "Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is *expressly conferred* upon them by law, or *clearly implied* from some other power expressly given, which cannot be fairly exercised without it."

And in the same case—on page 410—the court say that in *Lynde v. Supervisors*, the authority to issue bonds was expressly based on the power to "*borrow money*," without which power the bonds would have been invalid.

But, besides the power to *contract*, there is the power to *subscribe* to the capital stock "on such terms and conditions as they may stipulate and agree upon."

The "*terms* and *conditions*" apply to the *subscription* and not to the manner of securing payment. The act does not say "payable in such manner"—or "evidenced by such securities," but, "*subscribe* as many shares, and on such *terms* and *conditions*, etc,"

"*Terms*," clearly refers to the *time* of payment, instalments, calls, notice, etc.

"Conditions," refers to such stipulations as might be insisted upon with reference to the location of the road, the expenditure of the money, etc.

In *Curtis Co. v. Butler*, 24 *How.* 435, the legislative authority was "to make payment on such terms *and in such manner*," as they might think best, and in another part of the same Act "*bonds*" were mentioned, a fact which the court dwell upon, in affirming the authority to issue bonds; pages 446, 447.

Again, the principal and interest on the $100,000, of bonds issued in this case would amount to more than $200,000, although, the Act limits the amount to be paid, to $100,000.

This cannot legally be done.

Wells v. Supervisors, 102 *U. S.*, 633.

But, if there were any doubt as to the meaning of the 1st section of this Act of Nov. 15, 1858, the succeeding sections effectually solve and settle it. Provision is there made for the levy and collection of a tax, "to be levied and collected as other taxes of said city," to pay the *subscription* of stock provided for in the 1st section, upon an election to be held. Here, then, is a plain, simple, usual and effective way for paying the stock, provided at the same time and by the same Act as the authority to subscribe. This excludes the idea of bonds.

Wells v. Supervisors, 102 *U. S.* 625.

Wilson Co. v. Bank, 103 *U. S.* 777.

Counsel for plaintiff below insisted that the decision in *Wells v. Supervisors, supra*, turned wholly on the provision of the statute with reference to the *individual tax payer* receiving the certificates of stock in return for his tax receipts, and that it was not a *county* subscription or liability.

In answer, we cite the opinion, *top of page* 632: "This statute conferred an extraordinary power on the board of police. It authorized them to create a new liability *for their respective counties*, and provided a special way of discharging that liability. The liability and the mode of discharge were provided for in the same statute. This being so, the mode prescribed is exclusive of all others."

In *Claiborne Co. v. Brooks*, 111, *U. S.* on page 411, this court say "In the case of *Wells v. Supervisors*, 102 *U. S.* 625, 631, we held that the power to issue county bonds did not arise from a power to subscribe for stock in a Railroad Company, where authority was at the same time given to assess and collect a tax for the payment of the capital stock, and no other authority to raise the requisite funds was given."

IV

But the *proviso* in the 2nd section of this enabling Act of Nov. 15, 1858, is entirely inconsistent with, and completely negatives the idea of commercial paper.

The section provides that a tax shall be levied and collected, "to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this Act; *Provided*, That *before such tax shall be levied*, the same shall be approved by a majority of the legal voters" at an election, &c.

This is a wisely cautious, though singular, proviso, as applied to the payment of even a *naked subscription of stock*. As applied to *negotiable bonds*, it is preposterously absurd.

The Court will perceive that the election is not a condition precedent to the *making* of the subscription, but only to the levy of the tax to *pay* it when made. "*Provided*, That before such *tax shall be levied*, &c.

The authority to *subscribe* is absolute and unconditional. But, when it comes to levying and collecting a tax "to be applied to the *payment* of the aforesaid subscription of stock, as provided in the first section of this Act," the legal voters must pass upon it.

The Mayor and Selectmen vote the *subscription*. The qualified voters vote whether a *tax* should be levied to *pay* it.

Now, as between the Railroad company and the city, this proviso can work but little inconvenience. It might well be (as was in fact understood) the intention of the Legislature to hold the right of election over the Railroad company *in terrorem* to enforce performance of the "conditions" upon which the subscription was made.

If there was only a subscription of stock, between the City and Railroad Company, the proviso could work no harm. If the tax was voted, the subscription was paid. If it was not voted, the Company cannot complain, for it took the subscription with the knowledge of the condition imposed by the law, and the only result is, that the city does not get its certificates of stock, and the Railroad Company does not get its money. Before the election,

the liability on the subscription is inchoate. The voting of the tax completes it.

But, to hold that the first section of the Act authorizes the issuance of commercial paper, negotiable bonds, importing an absolute obligation to pay, scattered over the country into a thousand hands, and yet, that the 2nd section of the same law gives the legal voters the right to vote that no tax shall be levied to pay them, is simply out of the question. It is shocking to the commercial sense of the country.

It will not do to say, that if the first section authorizes bonds, the provisions of the sscond section do not apply, for the vote is to be taken as to whether a tax shall be levied "to be applied to the payment of the aforesaid subscription of stock *as provided in the first section of this Act.*" If, therefore, *bonds* are "provided in the first section of this Act," *their* payment is to be voted on.

The *proviso* then, being utterly inconsistent with the idea of commercial securities, and another mode being plainly provided, we submit the authority to issue bonds cannot be reasonably implied.

We, therefore, confidently submit, that the Act of November 15, 1858, does not—either expressly, or by implication, authorize the issuance of the bonds sued on, and no recovery can be had upon them or the interest coupons attached.

V

But, admit—for argument's sake—we are wrong, and that the first section does authorize the Mayor and Selectmen to issue bonds. The declaration is yet fatally defective, in not averring an *election*, as condition precedent to liability, under section 2, of the Act.

(The truth is, that no election was ever ordered or held, and that when the bonds sued on were issued, the city council were ignorant of the existence of this Act of November, 1858, as appears from the recitals in the bonds, and were acting under a strained construction of the consolidated charter, and the Amendment of February, 1867.)

The doctrine of *Lincoln v. Iron Co.*, 103 *U. S.*, 412, does not apply here, as *there* the condition precedent, was to the *issuance* and *original validity* of the bonds; and it was held that, being *prima facie* binding, the plaintiff need not aver performance of conditions precedent, but the defendant must set them up by plea.

Here, (granting the power to exist) the Mayor and Selectmen are empowered to *issue* the bonds without any *precedent election*. Under the first section, the subscription is made and the bonds *issued* strictly according to law; they take their place in the market as authorized commercial obligation; and, yet, the city is not bound to *pay* them. No judgment can be rendered against her on them, because, until an election has been held, she cannot be held *liable* to pay them. He, who takes these securities in the market, takes them with the knowledge that, however legal their *issuance*, their *pagment* depends on a subsequent election by the legal voters.

No judgment can be rendered against the city, for a judgment always pre-supposes a liability to pay. Courts will not do a useless thing. It will surely not be contended that we should suffer a judgment against the city, and then order an election, and set up an adverse vote as a defense to a mandamus! And yet, the law is imperative. No tax can be levied until an election is held.

The recitals on the bonds constitute no estoppel, for, (granting the power to issue them) even *without* an election, it is *true* that they *were* "ISSUED, under and pursuant to the constitution and laws of the State of Mississippi, and the charter of the city of Aberdeen," &c.

It is not the *issuance* that the election must authorize, but the levy of the *tax* to *pay* them *when* issued. The bonds might be *issued* legally, and, yet, the city is not liable to pay or be sued on them until an election. Though she has legally issued her paper, she has not promised to *pay* it until the voters have so voted.

It is difficult to argue this question and not revert to the

utter incongruity of the claim, that bonds are authorized by the first section of the Act.)

This being the case, to establish the liability of the city, the declaration should have averred a subsequent election, at which a majority of the legal voters authorized the levy of a tax to pay the bonds, "whereby the city became liable to pay them according to their tenor and effect."

V I.

But, admit we are wrong on the foregoing proposition, and that the election is a condition precedent to the *issuance* of the bonds sued on, this is still more fatal to plaintiff's declaration and case, because the bonds and the declaration together, show *affirmatively*, (what is the truth) that no election was ever held. This is not the case of a mere *absence* of recital, as in case of *Merchant's Exchange Nat. Bank v. Board of Freeholders*, decided Nov. 16, 1885, 6 *Sup. Court Reporter*, *page* 88, but these bonds recite on their face, that they were issued under and pursuant to an "ordinance passed by the Mayor and Selectmen of said city, on the 27th day of April, 1870," and this ordinance is given in full in the declaration, and it does not order, or require, or even mention any election. *De non apparentibus et de non existentibus eadem est ratio.*

"Wherever the want of legislative authority appears by the face of the bond, taken in connection with the Act which the bond mentions, every taker of the bond has notice of the want of power."

Anderson Co. v. Beal, 113 *U. S.*, *on page* 238.

American Law Review, *Jan'y-Feb'y*, 1885, 87.

Assuming then, that the election is a condition precedent to the issuance of the bond, the declaration is fatally demurrable, because it shows affirmatively on the face of the bonds sued on, that no election was ever held, and that said bonds were therefore illegally issued.

Buchanan v. Litchfield, 102 *U. S.*, 292.

VII.

But, it is claimed by plaintiff, that all the original invalidity of these bonds has been cured by the Curative Act, of March 16, 1872, Acts, 1872, page 314, section 4, which reads:

"*Be it further enacted*, That all subscriptions to the capital stock of the said Selma, Marion and Memphis Railroad Company, made by any county, city or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed."

(It is admitted that the Selma, Marion and Memphis Railroad Company, is the same as the Memphis, Holly Springs, Okolona and Selma Railroad Company, with a new name.)

The answer to this claim is easy:

1. The intention of the Legislature to confirm and ratify the illegal issuance of these void securities cannot be ascertained with certainty from the language of the Act, which is too vague to form the basis of so important an authority as that sought to be deduced from it.

Hayes v. Holly Springs, 114 *U. S.*, 120.

2. The Act says nothing about bonds and coupons, but, only legalizes the *subscription* of stock. The object is plainly to cure irregularities and illegalities in the subscription, and does not pretend to enlarge the authority originally given.

Hasbrouck v. Milwaukee, 13 *Wisconsin*, 37, 46.

3. Where an election is required, the Legislature cannot, by curative Act, dispense with it.

East Oakland v. Skinner, 94 *U. S.*, 258.

Ottawa v. Perkins, 94 *U. S.*, 270.

4. A curative Act can never validate any void proceeding under a former law, unless, at the time of the passage of the curative Act, the Legislature could, by an original law, have given the same authority as was given by the former law. But, in 1870 the Legislature of Mississippi could not constitutionally have passed this Act of November 15, 1858, on account of the prohibition in *Sec.* 14, *of Art.* 12, of the Constitution of 1870, forbidding any enabling Act which did not require a *two-third's* vote,

instead of a *majority*, as in the Act of 1858. This subscription was made and these bonds issued after the Constitution of 1870 went into effect. The Legislature then, being without power to pass the original law, could not validate void proceedings under it. It would be in effect passing a law authorizing a subscription upon a mere majority vote.

Grenada Co. v. Brogden, 112 *U. S.* 261, *top of page* 268.

5. The reference in the curative Act to the *Constitution*, "not made in violation of the Constitution," shows that the Act referred alone to subscriptions made under enabling Acts passed since 1870, under the *new Constitution*, (the old Constitution containing no provisison whatever on the subject.)

This construction has been given to the Act by the Supreme Court of Mississippi, whose decision will be binding on this Court.

Sykes v. Columbus, 55 *Miss.*, 115.

VIII.

The other grounds of demurrer, we will pass over briefly.

1. The first section of the Act of November 15, 1858, does not *name* the Memphis, Holly Springs, Okolona and Selma Railroad Co., (which was not then in existence.) Unless, then, that Company is included in the expression "any other Railroad Company," the right of the city to subscribe to its capital stock, did not exist. We submit that by a fair construction of the Act, it must be taken to mean "*existing* Railroad Companies." It was admitted below, that *some* limitation must be understood; otherwise, the city would be empowered to subscribe capital stock to a Railroad Co. in China, incorporated in A. D. 2000.

If, then, we must resort to construction, we insist that it is not unreasonable that the Legislature, by "other Railroad Companie," meant other Railroads *ejusdem generis*, as the one named, the New Orleans, Jackson and Great Northern; that is, Railroads then incorporated, and running or located through or near to the city of Aberdeen.

The case of *James v. Milwaukee*, 16 *Wall.* 160, is very differ-

ent from this. The Act in that case was passed to extend to future roads, the benefits of a prior Act, which "shall include" "any other Railroad Companies," (which shall be,) "duly incorporated and organized for the purpose of constructing railroads leading from the city of Milwaukee."

Each law must be construed according to its own language and by the light of well-known circumstances surrounding its passage.

It is certain that the party most interested, the city of Aberdeen, never construed this Act to include future Railroads. The recitals in their bonds refer alone to the *general charter*, and not to this specific Act.

2. The Memphis, Holly Springs, Okolona and Selma Railroad Company was never legally incorporated. The Act of February 27, 1867, Pamphlet Acts, 1867, 635, purports to revive and amend an "Act to incorporate the Memphis AND Holly Springs and Mobile Railroad Company, approved November 23, 1854." No such entitled Act exists. The only Act at all similar is "an Act to incorporate the Memphis, Holly Springs and Mobile Railroad Company, approved November 23, 1859," *Acts* 1859, *page* 51. The body of the Act does not correct the mistake. The variance is fatal. It is, in this case, not a mere *falsa demonstratio*, but a material misrecital of the name and date of a law, which is attempted to be revived and amended.

True, the word "AND," in the recited title *means* the same as the comma in the real title, but it is not a question of *meaning*, but as to what the Act is *entitled*.

South Ottawa v. Perkins, 94 *U. S.*, 629, 270.

The date, "*November* 23, 1854," is not a mere mis-print in the pamphlet Acts, but reads so in the engrossed and enrolled law, as the same appears on file in the office of the Secretary of State, of Mississippi.

3. But, if the Legislature did intend to revive and amend the Act of Nov. 23, 1859, and if we may presume such intention, the reviving and amending Act was void; it was a clear case of legislative usurpation. The Act of Feb'y 20, 1867 (Pamphlet Acts, 1867, page 635) commences, after the title "Section 1:

Be it enacted by the Legislature of the State of Mississippi, That the *above recited Act* be, and the same is hereby revived, and that the style of said Railroad Company shall hereafter be known as the Memphis Holly Springs, Okolona and Selma Railroad Company; *and, as many of the original corporators are now dead*, that N. B. Forrest James Elder, J. W. Clapp, (and 33 others), together with those who may hereafter become stockholders, their successors, etc., shall be said corporators."

The Act of November 23, 1859 purporting to be thus revived and amended, (Acts 1859, page 51), provides in section 1, for "perpetual succession," in section 4, for other parties becoming stockholders, in section 3, how the stock shall be transferrable.

The Legislature reserves no power to transfer the franchise in any way. In the absence, therefore, of judicial forfeiture, the Legislature cannot transfer the franchise of one set of corporators to another set. (In the Act of 1867, almost an entirely new set of corporators is named.)

The *facts* here are strikingly similar to those in *Dartmouth College v. Woodward*, 4 *Wheaton*.

Boston Water Power Co. v. R. R. Co., 23 *Pick*, 293.

West River Bridge Co. v. Dix, 6 *How.*, 507, 537.

Without any judicial forfeiture in this case, the Legislature *assumes* the fact *in pais* of the "death of many of the original corporators," and vests the franchise in a new set.

If we are right in the foregoing propositions, no such corporation as the Memphis, Holly Springs, Okolona and Selma Railroad Company ever existed, and commercial paper payable to them, in payment of subscriptions of capital stock is wholly void.

The authority cited by Counsel below, on the subject of *de facto* Corporations, were all cases of irregular or defective *organization* under legal charters. No organization, without a charter from the sovereign power, will create a legal corporation.

We think the District Court was right in sustaining the demurrer to the declaration, not only on the grounds named in the opinion, but on all the grounds specified in the demurrer.

We ask an affirmance.

E. O. SYKES,

[redacted],

For Defendant in Error.

121-172

IN THE

Supreme Court of the United States.

KATZENBERGERS SONS. PLAINTIFFS IN ERROR.

v.

THE CITY OF ABERDEEN, DEFENDANT IN ERROR.

Error to the District Court of the Eastern Division of the Northern District of Mississippi.

BRIEF OF

BAXTER McFARLAND,

OF COUNSEL FOR DEFENDANT IN ERROR.

State Ledger, Print, Jackson.

IN THE

Supreme Court of the United States.

KATZENBERGERS SONS, Plaintiffs in Error.

v.

THE CITY OF ABERDEEN, Defendant in Error.

Error to the District Court of the Eastern Division of the Northern District of Mississippi.

Brief of Counsel for Defendant

Plaintiff in Error sued the defendant in error upon coupons to bonds issued by defendant in payment of a $100,000 subscription to the capital stock of the Memphis, Holly Springs, Okolona and Selma Railroad Company.

There was a demurrer to the declaration, which was sustained and the suit dismissed, from which judgment this appeal is prosecuted.

The principal point raised by the demurrer is the

want of power in the city of Aberdeen to issue the bonds.

The charter of the City is consolidated in the Acts of 1854, p. 216. There was an amendment in November, 1858,—Acts 1858, p. 221,—as follows:

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That the Mayor and Selectmen of the city of Aberdeen be, and they are hereby empowered to contract with the New Orleans, Jackson and Great Northern Railroad Company, and to subscribe in the name, and for the use of the city of Aberdeen, as many shares of the capital stock of said Company, and upon such terms and conditions as they may stipulate and agree upon, as they shall deem expedient, not exceeding in amount the sum of $100,000.

SEC. 2. *Be it further enacted*, That the Mayor and Selectmen of said city of Aberdeen, are hereby empowered to levy and collect a tax on all the property within the corporate limits of said city, subject at the time to State and county tax, and upon the annual gross incomes of all persons or corporations residing or doing business in the corporate limits of said city, to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this act; *provided*, That before such tax shall be levied the same shall be approved by a majority of the legal voters of said city, to be ascertained by an election held as other elections in said city.

SEC. 3. *Be it further enacted*, That the said tax shall be levied and collected as other taxes of said city, and the tax collector is hereby required to execute a bond with good security, to be approved by the said Mayor and Selectmen, conditional, for the faithful performance of his duties as such collector, as directed by the said Mayor and Selectmen. And such tax collector

shall receive for his services one per centum on the amount collected, and no more.

SEC. 4. *Be it further enacted*, That the gross amount of the annual income of each and every person and corporation residing or doing business within the corporate limits of said city, shall be ascertained by the said tax collector, who, for such purpose, is authorized and required to administer an oath to each person, or his agent, or the proper officer of a corporation as (to) the amount of his, her or their annual income; and any person willfully swearing falsely, as to the amount of such income, shall be deemed guilty of perjury, and upon conviction thereof, shall be punished as in other cases of perjury.

SEC. 5. *Be it further enacted*, That this Act shall take effect from and after its passage."

This amendment is relied on as giving power to issue the bonds. There are other amendments but none tending to uphold the bonds and coupons involved.

The Act confers no authority upon the city to issue these negotiable securities. It merely "empowered" the Mayor and Selectmen "to contract" with the company named, or with any other Railroad Company, "and to subscribe" in the name and for the use of the city as many shares of stock as they may think fit, not exceeding $100,000, the *subscription* to be upon such terms and conditions as they may stipulate and agree upon. "Terms" and "conditions" have reference to the provisions of the contract of subscription authorized, as to when and under what circumstances payable, not to the *manner* of payment, that being provided for by taxation in section 2.

There can be no doubt that the contract the city was empowered to make was a contract of subscription, and as little doubt that this contract of subscrip-

tion might be upon such "terms" as to installments, and "conditions" precedent to the right to payment as the parties should "stipulate and agree upon,"

That much authority was clearly given, if the act is valid, but not the dangerous power to issue negotiable securities in payment of the subscription. Payment by taxation is specifically provided for—Sec. 2—which is exclusive:

> Wells v. Supervisors, 102 U. S. 625,
> Wilson Co. v. Bank, 103 ib. 777;

"the money to be applied to the payment of the aforesaid *subscription* of stock *as provided for in the first section* of this act," not to bonds.

This construction is enforced by a view of public sentiment, and the legislative and judicial tendencies in Mississippi relative to aid by counties and towns to railroad corporations at the time of the passage in November, 1858, of the Act in question. Whilst in a few instances counties and towns had been authorized to subscribe to capital stock, it was nearly ten years later, and after the civil war, before they were permitted to issue bonds. Acts 1866, p. 86. Judicial construction was *stricti juris*, and is yet.

> *Sykes v. Mayor, 55 Miss. 115.*

Read in the light of cotemporaneous history bearing upon the subject it is manifest that there was no intention by the legislature to confer authority to issue negotiable securities in payment of the subscription authorized.

The argument below for plaintiff in error went mainly upon the theory that the power given to contract carried by implication authority to issue these negotiable securities, *Lynde v. Supervisors*, 16 Wall. 6, being

the case principally relied on in support of that view. This court has repudiated such a construction of that case.

Claiborne Co. v. Brooks, 111 U. S. 400.

In a few exceptional cases, such as *Curtis Co. v. Butler*, 24 How. 435, and some others, the language of the particular act has been construed to confer power to issue bonds, but never that the mere power to contract carries authority to issue them. The question in this class of cases was what was intended by the Acts, and the construction in each case was but the statement of what was meant by the language used. They are not cases determining what powers are *implied by law* but such only as were expressly given by *enactments*,—they *construed enactments*, and did not decide what powers were implied from others expressly conferred.

The rule in regard to implied powers resulting to counties and towns to issue negotiable securities has often been stated by this court to be such as were necessary.

Claiborne Co. v. Brooks, 111 U. S. 400.

The Supreme Court of Mississippi so holds as to local political sub-divisions, and its construction will be followed here.

Sykes v. Columbus, 55 Miss. 115.

The proviso to the second section is wholly inconsistent with the view that the Act confers power to issue negotiable securities. It requires the approval of a majority of the legal voters of the city to the *tax levy*. Their disapproval of the levy would defeat payment of bonds previously issued. This could not have been contemplated, hence it could not have been intended by the legislature that such securities should be issued by the counties subscribing.

This proviso is not to the first section, which gives the power to subscribe, but to the second, which gives power to levy and collect taxes to pay off the subscription. The officials are empowered to *subscribe* without the approval of the voters, but can levy the tax only in the event the same is approved by them. The act cannot therefore be construed as though the proviso were to the first instead of the second section, thereby obviating the difficulty just suggested by obtaining the approval in the outset to the subscription itself in lieu of the supervening tax levy. This would be a violent wresting of the proviso from its place and import, and will not be done to save these bonds and coupons.

The proviso, although unusual, can keep its place, if the view is taken that power is given by the act to make a contract of subscription only, which could not become "a clean obligation to pay denuded of all equities in the hands of purchasers."

II.

The curative statute, pamphlet acts, 1872, p. 314, sec. 4, does not apply to these bonds and coupons.

1. It refers to defective *subscriptions*, and not to void bonds. A defective subscription might be cured by this act, yet bonds issued without authority in payment thereof remain void. It does not enlarge the authority given by the original act.

Hayes v. Holly Springs, 114 U. S. 120;
Hasbrouck v. Milwaukie, 13 Wis. 37, 46.

2. Curative acts do not dispense with elections when exacted by the original act.

East Oakland v. Skinner, 94 U. S. 258.
Ottowa v. Perkins, ib. 270.

3. When the so called curative act was passed, in 1870, the legislature had no power, under Sec. 14, Art. 12, of the new State Constitution, to pass an Act with the provisions of the Act of 1858, as to a majority vote. The section requires a two-thirds vote, and any act requiring a majority only would be unconstitutional.

This subscription and these bonds are *subsequent* to the adoption of the new Constitution of 1870. The constitutional requirement would be evaded by applying the curative act to them.

Grenada Co. v. Brogden, 112 U. S. 261.

The Supreme Court of Mississippi has held that this curative act applies alone to subscriptions made under acts passed since the adoption of the new Constitution.

Sykes v. Columbus, 55 Miss. 115.

Other points made by the demurrer are fully discussed in the brief of associate counsel, and will not be repeated here.

It is respectfully submitted that the judgment should be affirmed.

BAXTER McFARLAND,

Of Counsel for Defendant in Error.